No. 625.

In the Supreme Court of the United States

October Term, 1908.

Supreme Court, U.
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JAMES H. McKENNEY
Clerk

W. J. MURRAY, JOHN McSWEEN, AVERY PA[illegible],
Petitioners,

vs.

WILSON DISTILLING COMPANY ET AL, AND THE FLEISCHMANN COMPANY, *Respondents.*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

J. FRASER LYON, STEVENSON & MATHESON,
ANDERSON, FELDER, ROUNTREE & WILSON, ABNEY & MULLER,
Attorneys for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1908

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON, et al., *Petitioners,*

vs.

WILSON DISTILLING COMPANY, et al., and THE FLEISCHMANN COMPANY, *Respondents.*

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of the State Dispensary Commission of South Carolina, and W. J. Murray, John McSween and Avery Patton, constituting said Commission (C. K. Henderson and B. F. Arthur having resigned as commissioners and their offices still being vacant), and W. J. Murray, John McSween and Avery Patton, as individuals; Farmers & Merchants Bank, Walterboro, S. C., The Bank of Hartsville, The Commercial and Savings Bank, Florence, S. C., The Farmers and Merchants Bank, Anderson, S. C., The Merchants and Planters Bank, Gaffney, S. C., The Bank of Dillon, The Central National Bank, Spartanburg, S. C., The Enterprise Bank, Charleston, S. C., The First National Bank, Spartanburg, S. C., The City National Bank, Greenville, S. C., The Peoples National Bank, Charleston, S. C., The Lexington Savings Bank, Lexington, S. C., The Greenville Savings and Trust Company, Greenville, S. C., Norwood National Bank, Greenville, S. C., The Peoples Savings Bank, Abbeville, S. C., Commercial Bank of Camden, National Exchange Bank, Chester, The Bank of Orange-

burg, The Peoples Loan and Exchange Bank, Laurens, The Bank of Charleston, being all of the appellants in the case in the Circuit Court of Appeals for the Fourth Circuit, the decree in which is sought to be reviewed by certiorari, except B. F. Arthur, C. K. Henderson, The Bank of Aiken, Aiken, S. C., The Peoples Bank of Union, Union, S. C., The Piedmont Savings and Investment Company of Greenville, Greenville, S. C., and the Merchants and Farmers Bank, of Spartanburg, S. C., who, after due summons and notice, failed and refused to join in said appeal, respectfully shows:

FIRST.

That in the year 1892, the State of South Carolina, by an Act of the General Assembly, entered upon an experiment in the management of the liquor traffic by taking charge of the business and making it a State monopoly. State officers were designated to manage the enterprise and the funds necessary for its conduct were drawn from the State treasury. The Board of Control, consisting of the Governor, the Comptroller General and the Attorney General, was clothed with the power to make rules and regulations for its management. Subject to these rules, the purchase of liquors and the distribution of them to the subordinate dispensaries was entrusted to an officer called a Commissioner. The business was made by the statute as essentially a part of the government as the management of its taxes or its public schools, and all the assets became as much the property of the State as its asylums or public institutions, or the funds in the vaults of the treasury. The Act was vigorously attacked in the courts as unconstitutional on the ground that the conduct of such a business was not within the police power of the State and was entirely without the sphere of governmental function. The constitutionality of the Act, so far as it provided for the State to own all the liquor brought into the State for sale, and to monopolize the sale of liquor within the State, was finally established by the judgment of the Supreme Court of South Carolina in the case of *State v. Aiken,*

42 S. C., 221, and subsequently by the judgment of the Supreme Court of the United States in *Vandercook v. Vance,* 170 U. S., 443.

Subsequently the following provision was incorporated into the Constitution of 1895: "The General Assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the State under such rules and restrictions as it deems proper; or the General Assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the State and may authorize and empower State, county and municipal officers, all or either, *under the authority and in the name of the State,* to buy in any market and retail within the State liquors and beverages in such packages and quantities under such rules and regulations as it deems expedient."

Under this provision of the Constitution, a new Dispensary Statute was enacted (22 Stats., 123,) changing in some particulars the details of the original Dispensary Law, but retaining in its entirety the scheme of State ownership and control. The State Dispensary and all its assets acquired under this statute are to be regarded as the property of the State, and the debts contracted in its lawful management are to be regarded the debts of the State, not only by virtue of the judgments of the highest courts of the land, but also by virtue of the express declarations of the Constitution of the State. With these lights before it, the Supreme Court of South Carolina held, in *State v. Farnum,* 73 S. C., 165, that the State Dispensary was as much a part of the State government and as subject to as full legislative investigation and control as the State treasury.

By the Statute of 16th February, 1907 (25 Stat., 463), the State Dispensary was abolished, and the county dispensary system for the sale of liquors under State authority was established in its stead. On the same date an Act was passed entitled: "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its

affairs." The Act provides for the appointment by the Governor of a Commission composed of five members. The powers and duties of this Commission, stated in short form, were: To close out the entire business and property of the State Dispensary, except the real estate, by selling their assets, collecting debts due and paying from the sales and collections all just liabilities at the earliest date practicable; to sell the liquors on hand to the county dispensaries, if it saw proper, but to no other person in the State; to return liquors illegally bought and to determine the legality of said "purchases" by investigating fully the circumstances surrounding all contracts for liquor; and to employ such assistant counsel as may be approved by the Attorney General, and such expert accountants and stenographers and any other person or persons the Commission might deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management and control at any time in the past, and to take testimony "either within or without the State"; to pay to the State Treasurer, after deducting expenses, "all surplus funds after paying all liabilities"; to "submit to the Governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated, a report in full of their actions and doings." By the last section of the Act it was provided "that the said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary and all the power and authority conferred upon the committee appointed to investigate the affairs of the Dispensary, approved 21st of January, A. D. 1906, be, and hereby is, conferred upon the Commission provided for under this Act: Provided, That for the purpose of investigation of the affairs of the Dispensary as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and indi-

vidually, or collectively, to exercise the power and authority herein conferred upon the whole Commission."

See *State of South Carolina Ex rel. Lyon, Attorney General, v. State Dispensary Commission*, 79 S. C., 316.

SECOND.

That in December, 1907, and in January, 1908, two separate bills were filed in the Circuit Court of the United States for the District of South Carolina, by the Wilson Distilling Company, et al., and The Fleischmann Company (hereinafter designated the plaintiffs), against the members of said State Dispensary Commission appointed by the Governor of South Carolina under the Act of the Legislature of said State, approved February 16, 1907. The bill filed by the Wilson Distilling Company, et al., was filed in behalf of themselves and all others holding claims for goods sold and delivered to the State Dispensary, and the bill filed by The Fleischmann Company was filed solely in its own behalf. The theory of each of said bills is that by said Act of February 16, 1907, the State of South Carolina placed a fund of about $800,000 in the custody of said Commissioners, divesting itself of the possession and title of and to said funds, and vesting such possession and title in said Commissioners, and creating an irrevocable trust for the benefit of the plaintiffs and other persons holding valid claims against said State Dispensary, which said claims amounted, in the aggregate, to about $600,000; that said Commissioners failed and refused to recognize and execute said trust by paying said claims from said trust funds, and therefore the plaintiffs prayed the Court to declare and execute said trust by a decree establishing both the validity and amount of the several claims, and directing their payment from said trust funds, and, as an incident to the relief sought, they prayed for an injunction and receiver.

The plaintiffs invoked the jurisdiction of the Court upon the sole ground of diversity of citizenship. (Record, pp. 2-7, 17-29.)

THIRD.

On each of said bills orders were issued by his Honor, Judge Pritchard, the Circuit Judge, requiring the defendants to show cause why an injunction should not issue and receivers be appointed, as prayed for, and the status of the fund was preserved by a temporary restraining order (Record, pp. 7-8, 29-30).

FOURTH.

In their return and answer to said rule to show cause, said Commissioners, without submitting themselves to the jurisdiction of the Court, but, on the contrary, insisting that it was without jurisdiction in the premises, averred:

(a) That said suits were, in fact and in legal effect, suits against the State, and not against the Commissioners, or either of them, except as in their official capacity they represent said State, and therefore contrary to the provisions of the Eleventh Amendment to the Constitution of the United States.

(b) That the purpose and intent of said suits was to administer funds and moneys belonging to said State, and in the custody of its duly authorized agents, and to coerce said State in the payment of the alleged debts of the plaintiffs, and to restrain a duly constituted court of the State, in violation of Section 720 of the Revised Statutes.

(c) That the State was a necessary and an indispensable party to said suits, and that under the provisions of said Amendment to the Constitution it could not be made a party.

(d) That the Court, for the reasons stated, was without jurisdiction.

(e) That both the validity and amount of the claims of the plaintiffs were disputed by the State, by its Attorney General and by counsel associated with him, and that at the time of the filing of the bills they were actually engaged in the investigation of all the claims against the State Dispensary, with a view, and for the purpose, of paying from said funds all "just liabilities."

(f) That no trust was created by the Act creating the Commission, but that, on the contrary, the Commission was a mere agent, instrumentality or administrative board, charged with powers, functions and duties belonging exclusively to the Legislative and Executive Departments, and that any interference therewith by the Court would be an encroachment inhibited by the Constitution of the United States.

(g) That the Commission was not impleaded as a wrongdoer—there being no charge of waste, neglect or mismanagement—and that it was sought to vest in the Court the discretion and judgment vested by the Act in the Commission.

(h) That there was no right or necessity for an injunction or receiver and that the bills should be dismissed (Record, pp. 11-16, 41-52).

FIFTH.

A number of persons holding claims intervened and were made parties-plaintiff (Record, p.). The banks in which the funds were deposited by the Commissioners were made defendants, and they were temporarily restrained from paying out the said funds (Record, p. 33).

SIXTH.

The Commission, after investigation, adjudged certain claims against the State Dispensary, amounting to $153,825.43, to be "just liabilities," and the claimants having brought this fact to the attention of the Circuit Judge, an order was passed modifying the restraining order, and authorizing the banks to honor the Commission's checks in settlement of said claims (Record, pp. 156, 205).

SEVENTH.

On March 5th, 1908, Judge Pritchard, the Circuit Judge, after a hearing of the parties, and upon consideration of the bills, returns and affidavits, handed down an opinion and held,

among other things, that the suits were not suits against the State, and that the State was not an indispensable or necessary party, and that an irrevocable trust was created which the Court had jurisdiction to enforce and execute (Record, pp. 88-99), and thereafter, on March 9th, 1908, the said Judge made and filed an order consolidating the bills, enjoining the defendants as prayed, appointing receivers, and directing the Commissioners and the banks to turn over and deliver said funds to the receivers so appointed (Record, pp. 190-193).

EIGHTH.

On March 27th, 1908, all the defendants in the consolidated cause (except those who after due summons and notice failed and refused to join in an appeal), prayed for and were allowed an appeal from said order (granting an injunction and appointing receivers) to the United States Circuit Court of Appeals for the Fourth Circuit and gave bond to prosecute the appeal (Record, pp. 311-320).

NINTH.

On May 26th, 1908, the appeal was argued in said Circuit Court of Appeals before Chief Justice Fuller and District Judges Waddill and Boyd, and September 15th, 1908, the Court handed down a decision sustaining the Circuit Judge in holding that the suits were not suits against the State and that the State was not an indispensable party; that the Act created a trust enforceable in the Circuit Court and that plaintiffs were entitled to injunction and receivers. The Court directed a decree affirming the order appealed from, but granted a stay of the mandate pending an appeal for a certiorari (Record, pp.), and subsequently granted an additional stay for thirty days.

TENTH.

Petitioners further show that on February 24, 1908, the Legislature of South Carolina passed an Act directing the

State Dispensary Commission to pay out of any funds in its hands arising from the business or property of the State Dispensary the sum of $15,000 into the State treasury, to be used for purposes specified in the Act. The Commissioners refused to pay said amount upon demand, because they were restrained from so doing by his Honor, Judge Pritchard, as hereinbefore fully set forth. Thereupon, to wit, on March 4th, 1908, the State, *ex rel.* Lyon, Attorney General, filed in the Supreme Court of South Carolina, a petition for mandamus to compel the Commissioners to comply with said Act and to deliver said sum to the Treasurer. In their response, the Commissioners, for cause, alleged the pendency of the suits against them in the Circuit Court, and that they were restrained by an order therein from paying out or changing the status of said funds, and they attached to their answer a copy of said bills, and of the restraining order, as a part thereof, that on March 14, 1908, and after a hearing of the parties, the said Supreme Court handed down an opinion, in which it held that the suits in the Circuit Court were suits against the State and that the State was an indispensable and necessary party; that the Act of February 16, 1907, did not create a trust, and that the funds in the custody of the Commissioners were not trust funds, but were the property of the State and in its possession through the said Commisisoners as its agents, and subject to the control of the State as much so as the funds in its treasury; that the restraining order made by the Circuit Court of the United States was void, as the court was without jurisdiction in the premises, and constituted no cause why the mandamus should not issue. The Court, for the reason stated therein, directed that the issuing of the peremptory writ be left in abeyance until the further order of the Court (Record, pp. 280-296).

Petitioners attach hereto as a part of this petition, and marked Exhibit "A", the Constitutional Provisions of the State of South Carolina and Acts of the Legislature with regard to the State Dispensary, with Act of February 24,

1908, directing payment of the $15,000 in the State Treasury for the prosecution of violators of the Dispensary law.

ELEVENTH.

On March 27, 1908, the Circuit Judge, of his own motion, made an order authorizing the Commissioners to pay over to the Treasurer the said sum of $15,000.

TWELFTH.

Petitioners further show that upon their qualification, each Commissioner gave bond to the State for the faithful performance of his duties, as required by the said Act, and that each of the banks, as security for the deposits, delivered to the Commissioners bonds, stocks and other collaterals, which are now in the treasury of the State of South Carolina; that petitioners are advised that if they withhold the funds from the receivers of the Circuit Court of the United States, they and each of them are subject to be adjudged in contempt of said Court, and continuously so until its order is complied with; that in this matter the decision of the Circuit Court of Appeals is final, unless this Honorable Court exercises its discretionary jurisdiction in the premises.

Petitioners are also advised that if they deliver the said funds to said receivers, then, under said decision of said Supreme Court of South Carolina, the Commisisoners and their sureties, as well as the banks, are liable to the State for the funds thus delivered to the receivers, and to any action in a court of said State against either or all to enforce such liability, or for a judicial sale of the collaterals deposited by said banks with said Commissioners as aforesaid, the order of the Circuit Court of the United States would not constitute a defense, and the delivery of the funds to the receivers, as required by the order, would not affect such liability.

Petitioners further show that the Circuit Court of Appeals for the Fourth Circuit, and the Supreme Court of South Carolina, are independent of each other, and the decisions of one

are not controlling on the other, but that each of said courts will yield only to the decision of this Honorable Court.

Petitioners therefore submit that without regard to whether the Act creating said Commission was correctly construed by said Circuit Court of Appeals, or whether it was correctly construed by the Supreme Court of South Carolina, it is not only proper, but absolutely necessary for the protection of your petitioners that this Court exercise its discretionary power to issue the writ of certiorari, and bring said case before it for adjudication, so as to enable petitioners to obey the orders and decrees of one of said courts, without disregarding the orders and judgments of the other, and to act in the premises with safety to themselves; and that, aside from the conflict between the Circuit Court of Appeals and the Supreme Court of the State of South Carolina, the questions in the case, and upon which the said courts have reached opposite conclusions, are of paramount gravity and importance, involving the suability of the State, whether the State is a necessary and indispensable party to suits against its officers or administrative boards, where it is sought to coerce the payment of disputed debts of the State, and whether the Circuit Court of the United States has jurisdiction of this case, and whether its orders and judgments are not void and may be ignored by independent courts of coördinate jurisdiction.

THIRTEENTH.

Your petitioners further submit that the said decree of the Circuit Court of Appeals, affirming the order of the Circuit Court, granting injunction and appointing receivers, should be reversed, because the said Circuit Court of Appeals erred:

1. In holding that the suits were not suits against the State in violation of the provisions of the Eleventh Amendment to the Constitution.

2. In holding that the State was not a necessary and an indispensable party to said suits.

3. In holding that the Circuit Court had jurisdiction of said causes.

4. In holding that the Act of February 16, 1907, created an irrevocable trust which could be enforced and executed by said Circuit Court.

5. In not holding that there was no equity in said bills, and no cause or necessity shown for the grant of an injunction or the appointment of receivers.

6. In not reversing the order and decree granting an injunction and appointing receivers.

7. In not directing a dismissal of the bills and each of them.

Your petitioners believe that the aforesaid decree of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled "W. J. Murray, John McSween, Avery Patton, et al., Appellants, versus Wilson Distilling Company, et al., and The Fleischmann Company, Appellees," to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An Act to Establish Circuit Courts of Appeal, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891; and that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said Act, and that the said judgment of the said Circuit Court of Appeals in

the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray.

W. F. Stevenson
(Abercrombie Matheson)
J. Rosen Lyon
B. L. Abney

SOUTH CAROLINA,
Richland County.

W. J. Murray, being sworn, says that he is one of the above named petitioners, and that the foregoing petition is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true.

W. J. Murray

Sworn to and subsribed before me this 30 day of October, 1908.

R. R. Bruce (Seal)
Notary Public for South Carolina.

EXHIBIT "A".

Constitutional Provisions.

Article VIII, Section 11, Constitution 1895.

"In the exercise of the police power the General Assembly shall have the right to prohibit the manufacture and sale and retail of alcoholic liquors or beverages within the State. The General Assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the State under such rules and restrictions as it deems proper; or the General Assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the State, and may authorize and empower State, county and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations, as it deems expedient: *Provided,* That no license shall be granted to sell alcoholic beverages in less quantities than one-half pint, or to sell them between sundown and sunrise, or to sell them to be drunk on the premises: *And provided, further,* That the General Assembly shall not delegate to any municipal corporation the power to issue licenses to sell the same."

Article XI, Section 12, Constitution, 1895.

"All the net income to be derived by the State from the sale or license for the sale of spirituous, malt, vinous and intoxicating liquors and beverages, not including so much thereof as is now or may hereafter be allowed by law to go to the counties and municipal corporations of the State, shall be applied annually in aid of the supplementary taxes provided for in the sixth section of this Article; and if after said application there should be a surplus, it shall be devoted to public school purposes, and apportioned as the General Assembly may

determine: *Provided, however,* That the said supplementary taxes shall only be levied when the net income aforesaid from the sale or license for the sale of alcoholic liquors or beverages are not sufficient to meet and equalize the deficiencies for which the said supplementary taxes are provided."

STATUTES.

A Concurrent Resolution.

To Investigate the State Dispensary.

Be it resolved by the Senate, the House of Representatives concurring:

Section 1. That a Joint Committee, consisting of three Senators and four members of the House of Representatives, be appointed by the presiding officers of the respective Houses to investigate the affairs of the State Dispensary.

Sec. 2. That said Committee be, and is hereby, empowered to send for papers and persons, to swear witnesses, to require the attendance of any parties whose presence shall be deemed necessary, to appoint an expert accountant and stenographer, and to investigate all transactions concerning said Dispensary and its management, and to take testimony either within or without the State, and shall have access at all times during their service to all the books and vouchers and other papers of said institution, especially in investigating the following facts:

(a) Whether or not it is a fact that houses represented by agents who are near relatives of the members of the Board of Directors, receive large orders at each purchase.

(b) Is it a fact that members of the Board of Directors are, or have been, agents for certain wholesale houses from which large purchases are made?

(c) Is it a fact that parties to whom large orders are given are not wholesale dealers, but brokers, and that the orders are filled by third persons, thus making the State pay the commissions of the middle-man?

(d) Was it necessary to purchase the large quantity of liquors ordered in December, 1904, to fill demands and especially the new and fancy goods purchased, which is unknown to the trade?

(e) Are the extraordinary heavy purchases made necessary to the best business interest of the Dispensary system?

(f) What is the financial standing of the business, and is it run on the best principles for the interest of the law as originally passed and amended?

(g) Is it a fact that the State, through the Dispensaries, is violating the Constitution of 1895, in that it is selling whiskey in less quantities than one-half of one pint?

(h) Is it a fact that the State is selling 5's in case goods to its customers and charging them for one quart?

(i) Is it a fact that certain agents are traveling over the State and offering special inducements to County Dispensers to "push" certain brands of liquors, and, if so, is it a fact known to the members of the State Board of Directors?

(j) Is it a fact that certain requirements of the law are dispensed with by County Dispensers by order of, or by the consent of, the members of the State Board of Directors?

(k) Has the whiskey which has been recently purchased been ordered out from the dealer, or is it held in reserve for future delivery?

(l) What is the indebtedness of the Dispensary for liquors which have been bought but not delivered?

(m) And any and all other matters relating to the management of the State Dispensary, and of any official or person in relation thereto.

(n) Is it, or not, a fact that excessive freights have been paid to railroads for transporting liquors into the State, when said liquors could have been shipped into the State by water at less cost to the State?

(nn) Whether there is any warrant of law or authority for the establishment and conduct of what is commonly known as "Beer Dispensaries," as they are now and have been conducted.

SEC. 3. That said Committee may at any time they may deem it advisable call to their assistance any of the State officers or employees of the State Dispensary, whose duty it shall be to render the said Committee any reasonable service that may be

required of them within the scope of its functions as prescribed by these Resolutions.

SEC. 4. That the said Committee shall convene as soon after the adjournment of this session of the General Assembly as practical, and shall organize by electing one of their number as Chairman, and shall report its findings to the next session of the General Assembly. That said Committee shall receive the same per diem and mileage as members of the General Assembly, and that the sessions of said Committee be open to the public.

SEC. 5. That nothing herein contained shall be construed to deny the said Committee the power to apply at any time to the General Assembly for such other power and authority as the circumstances arising during the investigation may seem to require.

SEC. 6. That said Committee shall have the right to punish for contempt as Courts of Common Pleas and General Sessions.

SEC. 7. That said Committee shall have a Marshal to serve its processes and keep order at its sessions, and his pay shall be fixed by said Committee. The pay of the witnesses shall be the same as that of witnesses in the Court of Common Pleas for Richland County, and all expenses shall be paid on the warrant of the Chairman of said Committee by the Liquor Commissioner out of the General Dispensary fund and charged as Dispensary expenses.

SEC. 8. That said Committee be, and is hereby, empowered to send for papers and persons, to swear witnesses, to require the attendance of any parties whose presence shall be deemed necessary, to employ expert accountants and stenographers and any other person or persons the Committee may consider necessary in the ascertainment of any facts pertinent to this inquiry; and said Committee is hereby authorized and empowered to investigate and inquire into all transactions connected with said State Dispensary and its management or control at any time in the present or past, and to investigate any and all purchases, sales, shipments, contracts, or other like transactions; and the personal connection, if any, of any member or members of the State Board of Control, or the State Liquor Commissioner, or any other citizen or official of this State, in the present or past, with any other corporation, concern or individual contracting with or supplying any spirituous

or intoxicating liquors, or other goods or commodities to said Board or Commissioner, or to the State; to take testimony either within or without the State; and to have access to all the books and vouchers and other papers of said institution or of any officer or employee thereof.

SEC. 9. That the costs and expenses of this investigation be paid by the State Dispensary, each member of said Commission to receive $4.00 per day and the usual mileage.

Passed January 31, 1905.

AN ACT TO PROVIDE FOR THE INVESTIGATION OF THE DISPENSARY.

Whereas, a Committee has been appointed to investigate the State Dispensary under the Concurrent Resolution of the General Assembly, dated the 31st day of January, 1905; and whereas, in the progress of the work of the said Committee some doubt has arisen as to the power of the said Committee in the discharge of their duties; and it being provided in Section 5 of said Concurrent Resolution that the said Committee should apply to the General Assembly for such other power and authority as the circumstances arising during this investigation may seem to require; therefore,

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That the Committee heretofore appointed under the terms of the Concurrent Resolution, dated the 31st day of January, 1905, or any other Committee or Committees that may be appointed, are hereby authorized and empowered to elect a Marshal, who, upon being sworn, shall be and become a peace officer of the State, and invested with all the power of Sheriffs and Constables in the service of any and all process issued by the Committee aforesaid, and with the power to arrest and imprison, upon the order of the said Committee, any and all persons who shall fail and refuse to obey any legal order of the said Committee, or who shall be guilty of any disorderly conduct in the presence of said Committee during any session thereof, or who shall be guilty of any contempt of the said Committee.

SEC. 2. The said Committee be, and are hereby, authorized and empowered to call before them by summons or notice, in such form as the Committee may adopt, and to be served by the Marshal of said Committee, or such other officer of the State as may be by the Committee required, such person or persons as the Committee deem proper, and to require such person or persons to answer, upon oath, any and all questions that the Committee may deem relevant and may propound to him or them; and upon the failure or refusal of such person or persons to obey such summons or notice, or to answer such question or questions, such person or persons shall be deemed to be in contempt of the authority of said Committee, and may be imprisoned upon the order of the said Committee in the common jail, to be there held until he or they shall comply with the order of the said Committee: *Provided*, That no testimony given by said witness shall be used against them in a criminal prosecution.

SEC. 3. The said Committee be, and the same is hereby, authorized to send for and to require the production of any and all books, papers, or other documents or writings which may be deemed relevant to any investigation, and to require said person or persons in custody or possession of said papers to produce the same before the said Committee, and any person or persons who shall fail or refuse to act on the order or notice of said Committee to produce said books, papers, or other documents, or writings, shall be deemed guilty of contempt of said Committee and be punished as provided in Section 2.

SEC. 4. Said Committee shall have power to administer necessary oaths, and any person who shall, after being sworn before said Committee, swear falsely, shall be deemed guilty of perjury, and, upon conviction, shall be punished as provided by law.

SEC. 5. That said Committee be, and they are hereby, authorized and directed to order the Commissioner of the State Dispensary to withhold the payment of any claims against the State Dispensary or any officer thereof, or the claims of any creditor against said State Dispensary or any of its officers, which they may deem advisable, until same is duly proved by the production of the books of the original entry, and all documents and correspondence relating to all their transactions with the State Dispensary, and to require the person or persons in custody or pos-

session of said books, documents, papers, and correspondence to produce the same before the said Committee in person, and when such proof has been submitted to and approved by the said Committee, and the State Treasurer is hereby forbidden to pay such claims upon written notice from the Chairman of the said Committee.

SEC. 6. This Act shall take effect and be in force immediately upon its approval by the Governor.

Approved the 24th day of January, A. D. 1906.

AN ACT TO PROVIDE FOR THE DISPOSITION OF ALL PROPERTY CONNECTED WITH THE STATE DISPENSARY, AND TO WIND UP ITS AFFAIRS.

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That immediately upon the approval of this Act the Governor shall appoint a Commission of well-known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

SEC. 2. Said Commission shall immediately organize by the election of a Chairman and Secretary from their number.

SEC. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary except real estate, and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided*, That no alcoholic liquors or beers shall be disposed of within this State except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel

s may be approved by the Attorney-General, and such expert ccountants and stenographers and any other person or persons he Commission may deem necessary for the ascertainment of any act or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, ither within or without the State: *Provided, further,* That all ayments shall be made in gold and silver coin of the United tates, in United States currency, or in national bank notes.

SEC. 4. The compensation of each member of said Commission hall be $5 per day for each day actually employed about the usiness, and actual expenses for the time engaged: *Provided,* That they shall receive no compensation for services rendered on his Commission after January 1, 1908.

SEC. 5. The said Commission shall pay to the State Treasurer, fter deducting their compensation and other expenses allowed y this Act, all surplus funds on hand after paying all liabilities.

SEC. 6. The said Commission is hereby authorized to employ uch bookkeepers, accountants, clerks, assistants and employees s they may deem necessary, and to contract with them at the me of employment for their compensation.

SEC. 7. The said Commission shall submit to the Governor, t the earliest day practicable, a complete inventory of all property eceived by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated a report n full of their actings and doings.

SEC. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee Appointed to Investigate the Affairs of the Dispensary, as prescribed by an Act to provide for the investigation of he Dispensary, approved 24th January, A. D. 1906, be, and ereby is, conferred upon the Commission provided for under his Act: *Provided,* That for the purpose of the investigation f the affairs of the Dispensary, as herein provided, each and very member of said Commission be, and hereby is, authorized nd empowered, separately and individually, or collectively, to xercise the power and authority herein conferred upon the whole Commission.

Approved the 16th day of February, A. D. 1907.

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO PROVIDE FOR THE DISPOSITION OF ALL PROPERTY CONNECTED WITH THE STATE DISPENSARY AND TO WIND UP ITS AFFAIRS," SO AS TO PROVIDE COMPENSATION FOR MEMBERS OF THE SAID COMMISSION FOR THE YEAR 1908, AND TO PROVIDE FOR THE SALE OF THE REAL ESTATE HERETOFORE USED IN CONDUCTING THE DISPENSARY, AND TO FURTHER PROVIDE FOR WINDING UP THE AFFAIRS OF THE STATE DISPENSARY.

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That an Act entitled "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its affairs," approved the 16th day of February, 1907, be, and the same is hereby, amended by striking out the figure 8 at the end of Section 4, and inserting in lieu thereof the figure 9, and by adding at the end of said section the following: "That in addition to the compensation herein provided for, each member of said Commission shall be allowed the sum of ($150.00) one hundred and fifty dollars:" *Provided, further,* That the per diem provided for herein shall begin on the date of the approval of this Act.

SEC. 2. That said Act be further amended by adding at the end thereof the following as Section 9: "Section 9. That the Commissioners of the Sinking Fund be, and they are hereby, authorized and required upon being notified by the State Dispensary Commission, that the real estate heretofore used for the offices and ware-rooms, the typewriters, adding machines, files, metal, and other furniture in the offices and ware-rooms, etc., of the Dispensary, and located at the corner of Gervais and Huger streets, in the City of Columbia, is no longer in actual use, to sell same under and pursuant to the terms of Section 91, Code of Laws of South Carolina, Vol. I, 1902: *Provided,* That the said property shall not be sold for less than seventy-five thousand dollars ($75,000.00), and the proceeds of such sale shall be turned into the State Treasury and applied to school purposes, as provided for by the Constitution of 1895, and the Acts of the Legislature carrying out the same: *Provided, further,* That the typewriters, adding machines, files, metal, and other furniture may be transferred by the Commissioners of the Sinking Fund to any of the

State offices that, in the judgment of the Commissioners, may need them.

SEC. 3. That said Act be further amended by adding the following as Section 10: "Section 10. That the judgment heretofore rendered in the Court of Common Pleas for Richland County against U. B. Hammet and W. O. Tatum, on account of liquors improperly seized by them and used by the State, together with the costs and expenses of defending the said suit, be paid by the Dispensary Commission out of the assets now in their hands belonging to the State, and arising from the assets of the Dispensary."

SEC. 4. That said Act be further amended by adding the following as Section 11: "Section 11. That said Commission is hereby declared to possess full power to pass upon, fix and determine all claims against the State growing out of dealings with the Dispensary, and to pay for the State any and all just claims, which have been submitted to and determined by it, and no other, out of the assets of the Dispensary which have been, or may hereafter be collected by said State Dispensary Commission: *Provided,* That each and every person, firm or corporation presenting a claim or claims to said Commission shall have the right to appeal to the Supreme Court as in cases at law: *Provided further,* That notice of intention to appeal shall be served upon said Commission within ten days of rendition of judgment by the said Commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court." So that said Act, when so amended, shall read as follows:

Section 1. *Be it enacted* by the General Assembly of the State of South Carolina, That immediately upon the approval of this Act the Governor shall appoint a Commission of well known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.00.

Sec. 2. Said Commission shall immediately organize by the election of a Chairman and Secretary from their number.

Sec. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary, except

real estate, and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided*, That no alcoholic liquors or beers shall be disposed of within this State, except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney-General, and such expert accountants and stenographers and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State: *Provided, further*, That all payments shall be made in gold and silver coin of the United States currency or in national bank notes.

Sec. 4. The compensation of each member of said Commission shall be five dollars ($5.00) per day for each day actually employed about the business and actual expenses for the time engaged: *Provided*, That they shall receive no compensation for services rendered on this Commission after January 1, 1909; *Provided further*, That in addition to the compensation herein provided for, each member of said Commission shall be allowed the sum of one hundred and fifty dollars ($150.00): *Provided, further*, That the per diem provided for herein shall begin on the date of the approval of this Act.

Sec. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

Sec. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants, and employees as they may deem necessary, and to contract with them at the time of employment for their compensation.

Sec. 7. The said Commission shall submit to the Governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated a report in full of their actings and doings.

Sec. 8. The said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary and all the power and authority conferred upon the Committee appointed to investigate the affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved 24th January, A. D. 1906, be, and hereby is, conferred upon the Commission provided for under this Act: *Provided*, That for the purpose of the investigation of the affairs of the Dispensary as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

Sec. 9. That the Commissioners of the Sinking Fund be, and they are hereby, authorized and required, upon being notified by the State Dispensary Commission, that the real estate heretofore used for the offices and ware-rooms, etc., of the Dispensary, and located at the corner of Gervais and Huger streets, in the City of Columbia, is no longer in actual use, to sell the same under and pursuant to the terms of Section 91, Code of Laws of South Carolina, Vol. I, 1902: *Provided*, That the said property shall not be sold for less than seventy-five thousand dollars ($75,000.00), and the proceeds of such sale shall be turned into the State Treasury and applied to school purposes, as provided for by the Constitution of 1895, and the Acts of the Legislature carrying out the same.

Sec. 10. That the judgment heretofore rendered in the Court of Common Pleas for Richland County against U. B. Hammet and W. O. Tatum, on account of liquors improperly seized by them and used by the State, together with the costs and expenses of defending the said suit, be paid by the Dispensary Commission out of the assets now in their hands belonging to the State and arising from the assets of the Dispensary.

Sec 11. That said Commission is hereby declared to possess full power to pass upon, fix and determine all claims against the

State growing out of dealings with the Dispensary. And to pay for the State any and all just claims which have been submitted to and determined by it, and no other, out of the assets of the Dispensary which have or may hereafter be collected by said State Dispensary Commission: *Provided,* That each and every person, firm or corporation presenting a claim or claims to said Commission shall have the right to appeal to the Supreme Court, as in cases at law: *Provided, further,* That notice of intention to appeal shall be served upon said Commission within ten days of rendition of judgment by the said Commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court.

Sec. 12. That no funds arising from the sale of the assets of the former State Dispensary, or from the collection of debts due the said Dispensary, or moneys delivered by the State Treasury to said Commission, shall be paid out for any purpose or to any person whatsoever, except upon the check of the chairman of said Commission, countersigned by the Treasurer of the State of South Carolina. And the Treasurer of the State of South Carolina shall countersign such checks as may be presented by the chairman of said Commission only upon presentation of the same, together with a certificate of said Commission or a majority thereof, which certificate shall show: that the said check is issued in payment of some expense provided for by statute, or necessarily incident to closing up the affairs of the Dispensary, or for services rendered said Commission in closing up the affairs of said Dispensary, or contracted for in accordance with law by said State Dispensary Commission, or that it is in payment of a claim of a creditor which has been adjudged by said Commission to be due, and upon such adjudication ordered paid.

In the Senate-House the 21st day of February, in the year of our Lord, one thousand nine hundred and eight.

THOS. G. McLEOD,
President of the Senate.

RICHARD S. WHALEY,
Speaker of the House of Representatives.

Approved the 24th day of February, A. D. 1908.

M. F. ANSEL,
Governor.

AN ACT TO MAKE APPROPRIATION TO MEET THE EXPENSES OF CRIMINAL PROSECUTIONS AND PROCEEDINGS AGAINST CERTAIN OFFICERS AND OTHER PERSONS, AND TO PROVIDE FOR THE PAYMENT THEREOF.

Section 1. *Be it enacted* by the General Assembly of the State of South Carolina, That the sum of fifteen thousand dollars, or so much thereof as may be necessary, be, and is hereby, appropriated to meet the expenses of any criminal prosecutions that have been or may be commenced against any person or persons charged with violation of the law in any manner connected with the late institution called the State Dispensary, including expenses of associate counsel, and such other expenses as may be incident thereto: *Provided,* That the Attorney-General shall not employ any member of the General Assembly as attorney in said prosecutions.

Sec. 2. That the said sum of fifteen thousand dollars shall be paid into the State Treasury by the State Dispensary Commission out of any funds in its hands arising from the business or property of the State Dispensary, and the same shall be paid out by the State Treasurer upon the warrant of the Comptroller-General; and accounted for in the same manner as other funds appropriated for the use of the Attorney-General's office.

Sec. 3. That this Act shall take effect immediately upon its approval by the Governor.

In the Senate-House the 22d day of February, in the year of our Lord, one thousand nine hundred and eight.

THOS. G. McLEOD,
President of the Senate.
RICHARD S. WHALEY,
Speaker of the House of Representatives.

Approved the 24th day of February, A. D. 1908.

M. F. ANSEL,
Governor.

In the Supreme Court of the United States

October Term, 1908.

No. 625.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON et al., Petitioners,

against

WILSON DISTILLING COMPANY et al. and THE FLEISCHMANN COMPANY, Respondents.

Brief of Solicitors for Petitioners on Writ of Certiorari.

J. Fraser Lyon, W. F. Stevenson, E. W. Kemmerer, E. L. Ahern, Counsel for Petitioners.

In the Supreme Court of the United States.

October Term, 1908.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON ET AL., PETITIONERS.

versus

WILSON DISTILLING COMPANY ET AL. and THE FLEISCHMANN COMPANY,
RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY J. FRASER LYON, W. F. STEVENSON, D. W. ROUNTREE, B. L. ABNEY, Counsel for Petitioners.

I.

ARE THE PETITIONERS ENTITLED TO THE WRIT?

The power of the court to grant the writ to review a decree of the Circuit Court of Appeals upon an appeal from an interlocutory order granting an injunction and appointing receivers is beyond question, as the court has repeatedly ruled "that the power of this court in certiorari extends to every case

pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that Court."

Forsyth vs. Hammond, 166 U. S., 514.
The Three Friends, 166 U. S., 1.
American Constr. Co. vs. J. T. & K. W. Ry. Co., 148 U. S., 372.
Fields vs. United States, 205 U. S., 292.

The original jurisdiction of the Circuit Court was invoked upon the sole ground of diversity of citizenship and the questions as to the jurisdiction of the Court and the application of the Constitution of the United States were subsequently raised in the answer and return of petitioners. It is well settled that a certiorari will lie without regard to whether the decree sought to be reviewed is final or interlocutory.

American Sugar Refining Co. vs. New Orleans, 181 U. S., 277.
Boston & Maine R. R. vs. Gokey, 210 U. S., 161.

The reasons for the exercise of this discretionary power are fully set forth in the petition and need no elaboration.

The conflict between the decisions of the Court of Appeals and the Supreme Court of South Carolina, fraught with disastrous results to the Commissioners and the banks, brings the case within the principle announced and emphasized by this Court.

Forsyth vs. Hammond, 166 U. S., 514.
Taylor on Jur. & Prac. Sup. Ct. U. S., Ps. 100 & 102.

II.

UPON THE MERITS.

We propose to treat our assignments of error as presenting three questions:

(1) Whether the suits are suits against the State;

(2) Whether the State is an indispensable party to such suits in such sense that the Court could not proceed to judgment without materially affecting its rights and interests in the fund;

(3) Whether the Act of 1907 created a trust and divested the State of all control or disposal of the State Dispensary property.

(1) *Whether the suits are suits against the State.*

The Circuit Court of Appeals reached its conclusion that these suits were not suits against the State by the following course of reasoning:

"The State, through its Legislature, has passed both the title and possession of the fund involved to the Commission for the purposes designated in the act, the first of which is to pay all outstanding just liabilities which had been incurred by the State Dispensary in the course of its operations. The fund being in the hands of the Commission charged with this duty, the State had no interest in so much thereof as is necessary to pay the just debts; then, how can it infringe any right of the State to have the true amount of the debts due by the defunct Dispensary judicially ascertained? . . . . We are constrained to hold the fund in their hands is by virtue of the provisions of the Act held in trust for the payment of the debts mentioned, and that the creditors of the State Dispensary have a property in the fund in the hands of the Commission to the extent that the debts are shown to be just, and that a judicial determination of the true amount of such debts can in no way affect the rights or interests of the State, the only interest of the State in the fund being, as declared by the Act, the residue after the just liabilities of the State Dispensary are paid, and this interest is subordinate to the payment of the said liabilities. . . . This suit is not against the State, nor is the State an indispensable party. Treating the fund in the hands of the appellants as a trust fund, and the duties of the trustees in regard thereto being clearly defined, the trustor is not even a necessary party to the suit brought to compel the trustees to discharge their said duties."

Upon this question we do not consider it necessary to go further back than the provisions of the Constitution of South

Carolina of 1895, and the Acts made in pursuance thereof. The Constitution of 1895 created and authorized the operation of a State Dispensary as a part of its governmental machinery. The clauses of the Constitution referring to this are Article 8, Section 11, and Article 11, Section 12. The Constitution of 1895 went into effect from and after the 31st day of December, 1895. In pursuance of such Constitution, the first Act of the Legislature was an Act, approved March 6, 1896 (22 Stats., 123). All other Acts relating to or amending this Act were made subject to and derive their authority from the sections of the Constitutions above named. With some changes from time to time, this law continued until February 16, 1907, when, by Section 47 of the Act, approved on that date, and which went into effect thereupon, the State Dispensary was abolished, and the regulation and sale of alcoholic liquors and beverages within the State was devolved upon the several counties through County Dispensary Boards (25 Stats., 462); the Legislature, however, distinctly declaring in said section that the repeal of the law establishing the State Dispensary should not have the effect of [redacted] the former Dispensary statutes for punishing as provided by law offences theretofore committed. The effect of this statute was simply to take the power of purchasing whiskeys and the making of contracts therefor out of the hands of the State Board of Control, which had theretofore been elected by the Legislature, and to devolve the authority, under Section 11, of Article 8, of the Constitution, upon county officers and not upon State officers. Section 6 of the Act of 16th February, 1907, 25 Stats., 468. That section is as follows:

"Section 6. The members of the said County Dispensary Board are hereby declared to be county officers, and are hereby authorized and empowered, under the authority and in the name of this State, to buy in any market and retail within the State liquors and beverages, as provided herein: Provided, That the State shall not be liable upon any contract for the purchase thereof beyond the actual assets of the Dispensary for which the purchase is made. The members of the County Dispensary Board and all Dispensaries shall be persons of known

moral character and not directly or indirectly applicants for appointment."

It is, therefore, too broad an assertion to say that the State of South Carolina has gone out of the whiskey business. It has simply distributed the power of purchasing and the sale of whiskey to the counties of the State or to county officers of the State, and not the State officers, while the purchases are still expressly made in the name of the State and under its authority, thereby expressing, as we submit, the intention of the Legislature never to change the relation between the State and that of the vendors of whiskeys from that of debtor and creditor, the relation which existed at the time the Act creating the Commission was passed. The sale of whiskey in South Carolina is still a departmental branch of its government, as construed by its Courts, and on account of such purchases the State is still the debtor to the vendor, and no action can be brought against the State on account of its immunity, nor against the County Boards because they represent the State.

It is apprehended that the learned Circuit Court of Appeals in its opinion has laid too much stress upon the point that the State Dispensary has been abolished, and that thereby the intention can be derived that it has abandoned its former policy of still keeping up the business through a State agency, and that, in so retiring from the business, it was the intention to declare a trust upon the property it held in connection with the State Dispensary in favor of the parties with whom the State had been dealing, honestly or dishonestly.

In view, therefore, of the Constitution and statutes of the State, it is clear that, at the time the State Dispensary was abolished on the 16th of February, 1907, the relation existing between the State and the alleged vendors of alcoholic liquors was that of debtor and creditor, and that the State Dispensary Board was simply the agent through whom the alleged contracts were made, being, as declared both by the statutes and by the decisions of the Courts of the State construing such statutes, officers of the State.

State vs. Farnum, 73 S. C., 165.

The relation of creditor and debtor existing between the vendors and the State on contracts made by State agents under statutory authority, what effect and result has been brought about by the Act of February 16, 1907, providing for the disposition of all the property connected with the State Dispensary, and to wind up its affairs? 25 Stats., 835.

The petitioners contend that the relation of creditor and debtor existing between the vendors and the State was not changed, and that by such Act a Commission was created to investigate, to determine and to declare what was the true indebtedness of the State to such alleged creditors on account of the purchases of alcoholic liquors, and upon such ascertainment to pay the amount so ascertained and determined by them; that, inasmuch as the Legislature had been for two years investigating the alleged fraudulent purchases and sales of whiskey made to and with its officers, the State Dispensary Board, and inasmuch as it had been satisfied that the present Board had been guilty of fraudulent and illegal conduct, and the Governor had, upon its suggestions, removed the Board of Control (*State, ex rel., vs. Ansel, Governor,* 76 S. C., 395; *Ex parte Parker,* 74 S. C., 466), it desired to create, and did create by this Act, a Commission to continue the labors and work of legislative committees, and clothed such Commission so created with all of the powers held by and conferred upon such committees, with the additional power heretofore mentioned of determining, ascertaining and paying the debts found to be true and just liabilities. It did not propose to relinquish control over the question of these claims, and expressly required reports to be made to the Governor, who, it is apprehended, had the power to direct and to require its law officers, in the name of the State, to sue for the moneys illegally obtained by the parties dealing with the Dispensary Board. Hence the investigation which the Commission was to carry on was not confined to purchases made for which claims were to be presented, but it was to proceed with the work of investigating into prior purchases and into the alleged fraudulent conduct of State officers.

This is plainly seen when reference is made to the sixth section of the Act, wherein the State Dispensary Board was

abolished, and in which it is declared that such prior offenses could still be prosecuted and the offenders punished.

From all which it is submitted that the Legislature, by such Act, did not intend to make an absolute assignment of this particular property for the benefit, either specially or generally, of the alleged creditors, who should be paid simply upon presentation of their claims, and whose claims should simply coincide with the items and amounts upon the books of the State Dispensary Board, with whom it was charged they had had fraudulent dealings, on account of which they had been removed from their offices by the Governor of the State.

The petitioners, therefore, cannot take the view entertained by the Circuit Court of Appeals that this act was similar in substance to the usual form of conveyance of property in trust for the benefit of creditors, and that the State, acting through the Legislature, passed the absolute title and possession of the property to the Dispensary Commission. On the contrary, they believe that the proper view is that the Legislature, in accordance with the power given it under Article 17, Section 2, whereby it is authorized to direct by law "in what manner claims against the State may be established and adjusted," created a tribunal to investigate the *bona fides* and legality of these claims, and to determine the just liability of the State to these alleged creditors, clothing it with adequate and sufficient judicial power to have such investigation and to carry out the duties devolved upon it.

Such commissions and tribunals are not unusual in South Carolina, nor in other States or even with the Federal government. They may not be courts in the sense of the Federal Constitution and statutes, nor in the sense of the State Constitution and its statutes. Nor, while it was made an assignment of error, was it insisted upon in argument that it was under the Act of 1907 a court, but that it was such under the amendatory Act of 1908, which may be hereinafter referred to.

The Commission, as individuals, have no interest in the fund. They are mere agents holding a fund, with the power, after they shall have determined what is a just liability, to pay

the same over out of the fund. The assets are still the assets of the State. Being officers of the State, with the funds of the State in their possession belonging to the State, and these suits being brought by alleged creditors of the State. the State is the real party in interest, and the suit is virtually against the State.

Opinion Supreme Court of South Carolina, Rec. 280, *et seq.;*
Brown University case, 56 Fed., 55;
Yale College case, 52 Fed., 177;
Lowery vs. Thompson, 25 S. C., 416;
Board, etc., vs. Gant, 76 Va. ;
Louisiana vs. Jumel, 107 U. S., 711.

In *Hagood vs. Southern*, 177 U. S., 52, where bills were brought in the Circuit Court of the United States, the Court said:

"The suits are accurately described as bills for the specific performance of the contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such if it chooses; and except with that consent it could not be brought before the Court and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contracts by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that 'the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced

or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' "

Further, the Court said:

"If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be."

We do not consider that it would be useful to undertake to discuss the many cases which have been determined by the Supreme Court of the United States, for it seems to us clear that this case cannot be classified with those cases which are brought in a court of equity or by mandamus to require officers to perform a plain official duty, the position in which the Circuit Judge appears to maintain that this case falls. There is no claim made, and none can be made, that the Act of 1907 is unconstitutional, either impairing their original contract right or depriving them of property without due process of law. The State Dispensary Commission are not defending any case of trespass or of wrongs they may have committed towards the persons or property of the complainants under an unconstitutional statute; nor are they affirmatively, through and by means of an unconstitutional statute, injuring the complainants or invading any of their property rights; nor are they attempting to enforce an unconstitutional statute. Consequently, this case does not fall within any class of cases mentioned by the learned Circuit Court of Appeals, nor is it similar to any of the cases cited by the learned Court. These suits fall into that class of cases where the action of the Court will have the effect of depriving the State of funds or property in its possession, which class of cases comes into conflict with the Eleventh Amendment.

(2) *Whether the State is an indispensable party to such suits in such sense that the Court could not proceed to judgment without materially affecting its rights and interests in the fund.*

Assuming the construction of the Circuit Court of Appeals to be correct, that the legal title, possession and control of the property had passed to the Commission under the terms of the Act of 1907, still, as these claims had to be established against the State, our assignment of error is that the State must necessarily be a party to such adjudication as one of the beneficiaries of the trust and one interested in the fund to be disposed of, and, being such indispensable party, under the rules and practices of the Court, the Court not being able to make the State a party, the bill must be dismissed, and the Court is without jurisdiction to proceed further.

The prayers of both bills of complaint are that it shall be referred to a master to ascertain and determine the amount due the complainants for goods sold and delivered by them to the State Dispensary, and that a decree be entered ordering and directing the amounts so found to be due to be paid. The State Dispensary Commission, neither as a Commission nor as individuals, have any personal interest in the funds. They have only certain official duties to perform. There is nothing in the statute which authorizes them to appear in court to prosecute or defend actions brought by these creditors against the State, nor has the State provided in such action that its law officer shall represent it in any judicial investigation in State or Federal Court; but the claims to be investigated and determined are claims and alleged debts not of the State Dispensary Commission, but of the State of South Carolina. For we conceive that, where it is referred to a person or commission to determine upon the liability of the donor, both legal anl equitable, such person or commission, as such trustee, thereby created, cannot be reduced to the rank of attorney and agent for the party and required to defend his interests. The sole party interested in defeating wholly or in part each and every one

of these claims is not the Commission but the State of South Carolina, which is entitled to the remainder of the money after the payment of all just liabilities. The judgment to be rendered is a judgment not against the State Dispensary Commission, but in each and every one of these claims it is a judgment against the State of South Carolina, and if jurisdiction is retained we necessarily will have a case or cases where the complainants are prosecuting claims against the State of South Carolina as their debtor in a court in which the State is not represented and is not a party, and in which it is sought to enter a decree or judgment against her and to take funds to satisfy such judgment or decree which otherwise would belong to the State, and which, under the terms of the Act, should be returned into her treasury.

The Circuit Court of Appeals held:

"This suit is not against the State nor is the State an indispensable party. Treating the fund in the hands of the appellants as a trust fund and the duties of the trustees in regard thereto being clearly defined, the trustor is not even a necessary party to the suit brought to compel the trustees to discharge their said duties."

It further holds that the provisions of the Act creating the Dispensary Commission are strikingly similar in substance to the usual form of conveyances of property in trust for the benefit of creditors, and notwithstanding the State is the donor of the trust and is entitled to the surplus after the payment of its just liabilities to be ascertained by said Commission, and the expenses thereof, that it does not have any present interest in the fund in controversy which can be divested by a judicial determination of the true amount, if any, justly due the complainants, although it is not a party to such judicial investigation. We respectfully submit that the Court of Appeals has committed error, and that the State is a necessary and indispensable party, even upon the assumption that the State has passed absolute control and possession of the property to the State Dispensary Commission.

In *Gregory vs. Stetson*, 133 U. S., 586, it is said:

"The rule as to who shall be made parties to a suit in equity is thus stated in Story's Eq. Pl., Sec. 72: 'It is a general rule in equity (subject to certain exceptions, which will be hereafter noticed) that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree which shall bind them all. By this means the Court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the Court the whole case may be seen; but it may not where all the conflicting interests are not brought out upon the pleadings by the original parties thereto.' See, also, Daniel's Chancery Pl. & Pr., 246 *et seq.*"

The Court further said:

"In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person's rights without having him either actually or constructively before it. This principle is fundamental."

In the case of *Minnesota vs. Northern Securities Co.*, 184 U. S., 235, it is said:

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of the suit are to be made parties to it, so that there may be a complete decree which shall bind them all. * * * The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear

reasoning, and may be enforced by the courts *sua sponte*, though not raised by the pleadings or suggested by counsel;" citing cases.

Again, quoting from *Minnesota vs. Northern Securities Co., supra:*

"When it appears to a court of equity that a case otherwise presenting ground for its action cannot be dealt with because of the absence of essential parties, and it further appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, as in the case before the court, when made parties, the jurisdiction of the court will thereby be defeated, it would be useless for the court to grant leave to amend."

See, also, the late case of *Garzot vs. de Rubio,* 209 U. S., 297.

Where it is clearly seen that the State is an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction.

Cunningham vs. Macon R. R. Co., 106 U. S., 446.

A State is an indispensable party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its obligations.

Christian vs. Atlantic, &c., R. R., 133 U. S., 233.

We do not concede that these cases come within that class in which the interests of the State may be indirectly affected by judicial proceedings without making it a party, for in those cases the title in fee or the possession of the property is not in the State, but it only has some lien or claim against it subordinate to and not involved in the prior claim; such as in the case where it is a subsequent mortgagee. There its right of redemption will not be affected, nor is its right necessarily involved in that of the prior mortgagee. But in this case the claims that are to be presented are disputed in toto, and the

State is a party to such contract and is the proper person to make the defense against such claims.

In *Vetterlein vs. Barnes*, 124 U. S., 167, the rule is recognized that, to a suit against trustees to enforce the execution of the trust, *cestuis que trust* claiming present interests directly opposed to those of the plaintiff should be made parties in order that they may have opportunity themselves to defend their rights and not to be obliged to rely upon the defenses made by the trustees, or to resort to a subsequent suit against the trustees of the plaintiffs, or to take the risk of being bound by a decree rendered in their absence.

But it was also stated that the rule is different where the claim of the plaintiff antedates the creation of the trust and the suit is brought, not in recognition or furtherance of the trust, but in hostility to it as fraudulent and void.

Here it is claimed that the suit is brought to enforce the trust and not in opposition to the trust. The rule, therefore, must prevail that the State is one of the beneficiaries of the trust and a party to these contracts, and entitled to set up all proper and legal defenses against it, and should be made a party to the suit, for its right to the surplus is directly dependent upon its defeating the claims which it disputes.

"In a suit to enforce the trust under an assignment, the trustee must be brought before the court; and a proceeding without notice to him would be erroneous. If the assignment is unconditional, the assignor, his heirs or representatives, need not be made parties; but if there is an express stipulation that the surplus shall be paid to the assignor, he or his representatives must be made parties."

Perry on Trusts, 3 ed., Sec. 595, citing *Haugton vs. Davis*, 23 Me., 28.

"When a trust is created for the benefit of certain specified creditors, and a suit is brought against the trustees for the execution of the trust, not only should those creditors generally be made parties, but the person who created the trust also, or

his personal representative." Story, Eq. Pleadings (10 Edition), Sec. 149.

See, also, Story's Equity Pleading, 10th ed., Secs. 149 and 207; 6 Pomeroy's Equity Jurisprudence, Secs. 713, 891.

"The true principle would seem to be that in all cases where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent or validity of the assignment is not doubted or denied, and there is no remaining liability of the assignor to be affected by the decree, it is not necessary to make the latter a party. At most, he is merely a nominal or formal party in such a case. * * * But, where the assignment is not absolute and unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights or liabilities of the assignor which may be affected by the decree, there he is not only a proper but a necessary party. The general rule will hereafter occur under other aspects where the legal estate is in one person and the equitable estate is in another, and where the equitable or legal interest assigned still leaves some rights or claims to be settled in which the presence of the assignor may be material to his own interests or to those of the adverse party."

Story's Eq. Pl., 10 ed., Sec. 153, and notes.

In *Barney vs. Baltimore City*, 6 Wall., 280, it is said:

"There is a third class (of parties) whose interest in the subject-matter of the suit and the relief sought is so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, and these parties cannot be subjected to its jurisdiction."

"The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First, where a person will be directly affected

by a decree he is an indispensable party, unless the parties are too numerous to be brought before the Court, when the case is subject to a special rule. Secondly, where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if it is possible, and the Court will not proceed to a decree without him if he can be reached. Thirdly, where he was not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

Williams vs. Bankhead, 19 Wall., 571.

Where a proceeding in equity concerns the disposal of a specific fund, a person claiming the fund and liable by a decree to have it wholly swept from him is an indispensable party.

Williams vs. Bankhead, 19 Wall., 563.

Upon a bill filed by the United States proceeding as an ordinary creditor against a debtor of its debtor for an accounting, etc., the original debtor to the United States ought to be made a party to the account taken between him and his debtor.

United States vs. Howland and Allen, 4 Wheat., 108.

The reason is that a decree in favor of the United States against the debtor of its debtor would not be binding against the original debtor of the United States, and, therefore, the original debtor must be made a party to the suit.

If the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties.

Mallow vs. Hinde, 12 Wheat., 194.

The amount due these complainants, as appears from the record, is not fixed, but is open to controversy, and, as is said in *Mullow vs. Hinde, supra,* no court can adjudicate directly upon a person's right without the party being actually or constructively before the court.

Chadbourne vs. Coe, 45 Fed., 822;
Ribon vs. Railroad Cos., 16 Wall., 450.

In the case of *Shields vs. Barrow,* Justice Curtis, after citing the case of *Russell vs. Clark's Executors,* 7 Cranch, 98, proceeds to classify parties to a bill in equity. He makes three classes of them: (1) formal parties; (2) persons having an interest in the controversy and who ought to be made parties in order that the court may act on that rule which requires it to decide on a final determination the entire controversy, and to do complete justice by adjusting all the rights involved in it; while such persons are commonly termed necessary parties, yet if their interests are separable from those of the parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting other persons not before the court, they are not considered indispensable parties; (3) persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

In this last class certainly this case must fall, because the State not only has an interest in the controversy as to the removal of the Commission, who under the theory of the Circuit Court of Appeals, must be considered trustees, and as to the disposition of the fund, but its financial interest as to what shall be the surplus is of such a nature that a decree entered in the claim of complainants to these bills must of necessity affect its rights in and to the assets held by such trustees, for if it be conceded that the court may proceed to judgment to determine what is the just liability in this case of the State to these parties, the State cannot be concluded by such judgment unless such

trustees represent it to such an extent as to be in fact and in reality the agents of the State under statutory duty to defend the interests of the State. For, if the State can, as is admitted by the Circuit Court of Appeals, intervene and set up the defenses indicated in the return of the Commission, and set out in the opinion of the court, then the decree which would be rendered without such intervention would not be conclusive upon the State, because it had never had its day in court. If, then, such determination, in the absence of the State, is not conclusive upon it, it follows necessarily that before effect can be given to the judgment of the court the State should have been a party to the suit. The illustrations given by Mr. Justice Curtis in *Shields vs. Barrow* fully illustrate the necessity of the debtor, the State, being made a party to these suits.

(3) *Whether the Act of 1907 created a trust and divested the State of all control or disposal of the State Dispensary property.*

The Circuit Court of Appeals held that the State, through its Legislature, had passed the title and possession of the fund involved to the Commission for the purposes designated in the Act, the first of which was to pay all outstanding just liabilities which had been incurred by the State Dispensary in the course of its operations, and that the fund being in the hands of the Commission charged with this duty, the State has no interest in so much thereof as is necessary to pay the just debts, and that no right of the State could be infringed to have the true amount of the debts due by the defunct Dispensary judicially ascertained by the court in these suits; that the fund in the hands of the Commission is, by virtue of the provisions of the Act, held in trust for the payment of the debts mentioned, and that the creditors of the State Dispensary have a property in the funds in the hands of the Commission to the extent that

the debts are shown to be just, and that a judicial determination of the true amount of such debts can in no way affect the rights and interests of the State, the only interests of the State in the fund being, as declared in the Act, the residue after the just liabilities of the State Dispensary are paid, and this interest is subordinate to the payment of the said liabilities, and that the fund in the hands of the Commission must be treated as a trust fund.

The contention, however, of the petitioners is that the Act of 1907 created a Commission to ascertain what were the just liabilities of the State towards certain persons who had been dealing with one of its institutions, and with officers who had been removed by its Chief Executive on the ground of illegal and improper conduct in creating the very claims to be investigated; that under the conditions existing it never was the intention of the Legislature to create any trust in their favor except such as might result after the Commission had made investigation and had determined their just liabilities; that the Legislature had no authority but to make such law in conformity with the Constitution of 1895, Article 17, Section 2, which reads:

"The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted,"

and that such section was also limited by a former section, Article 3, Section 30, of the Constitution, which declares that

"The General Assembly shall never * * * authorize payment or part payment of any claim under any contract not authorized by law. * * *"

The petitioners claim that the Act of 1907 is nothing but an Act which authorizes claimants to sue or to have their claims established against it, and to be paid out of a certain fund. Allowing such claims to be established and sued on could not be construed as admitting the validity of the claim.

Bank vs. State, 60 S. C., 465.

The statute books of the State contain instances where the Legislature has seen fit, instead of making the investigation through its own committees, to devolve this duty upon certain persons as Commissioners or upon regularly appointed tribunals. But no State decision has ever held that by such Act a contract was created between the State and the claimants, which disabled the Legislature from either modifying or repealing such statute.

Campbell vs. Sanders, 43 S. C., 577.

As an instance of the General Assembly prescribing a special mode of establishing and adjusting claims against the State, see Joint Resolution "providing mode of ascertaining the debt of the State, and of liquidating and settling the same." 16 Stats., 669. By this Joint Resolution a special court was established with a right of appeal to the Supreme Court of the State, and also of right of appeal by writ of error to the Supreme Court of the United States. One of the provisions of this Joint Resolution required that "all persons holding bonds or coupons of bonds, certificates of stock, or interest orders thereon, issued by this State since the 1st of January, 1866, before they could be entitled to the benefits of the Act, should present the same for examination before the person or persons appointed to examine the debts, liabilities and unfunded debt of the State, etc."

See, also, the establishment of a Court of Claims by an Act "To provide for the settlement of the unfunded debt of the State incurred before the 1st of November, 1876" (16 Stats., 555). This Court of Claims was to be held by a commissioner "for ascertaining all legal and just claims," and by an amendment to this Act the burden of proof was declared to be upon the claimant to establish the *bona fides* of the original consideration upon which the claim was based (16 Stats., 788).

As a further instance, see the Joint Resolution to raise a Commission to investigate the indebtedness of the State (16 Stats., 318). This Act is not dissimilar to that approved on the 24th of January, 1906, and entitled "An Act providing for

the investigation of the Dispensary." The several Commissions and Courts of Claims are discussed in the *Bond Debt Cases* (12 S. C., 200), and *Ex parte Childs,* 12 S. C., 111.

The Act of 1907 creating the Commission gives no right of appeal, nor does it contain the usual features of an Act creating a court, but the Legislature was under no legal obligation to provide either any form of proceedings or to create a court with the right of appeal to a court for the benefit of its debtors. The relation of creditor and debtor existing between the State and the vendor of whiskey, such vendor had only the moral obligation of the State to look to for the fulfillment of its contract. The State certainly had the power, therefore, to prescribe any conditions it saw fit upon which these claims should be presented and paid, or to shield itself behind its immunity entirely against the payment of the debts. But certainly the power of investigation given by the Act was judicial in its nature. No contract was made by the Act of 1907 or intended to be made.

The case of *South Carolina vs. Gaillard,* 101 U. S., 433, we think, is directly in point. The General Assembly of South Carolina passed on June 9, 1877, an Act entitled "An Act to provide for the mode of proving bills of the Bank of the State tendered for taxes and the rules of evidence applicable thereto." While this Act was of force, Trenholm, a holder of certain bills of the Bank of the State, in pursuance of the Act, tendered such bills to the treasurer of the county in payment of his taxes and contended that by complying with the provisions of the Act so as to allow the bills to be deposited with the Clerk of the Court to abide the result of the proceeding that might be instituted with regard to them, the State entered into a new contract with him, by which it agreed to accept the bills tendered by him in payment of his taxes if he established their validity in the way provided. The Act was repealed. The Supreme Court of the United States held that this Act of ~~1907~~ 1877 created no new contract between the State and the taxpayer or bill-holder, but merely provided a new remedy which formed no part of the contract created by the charter of the bank; and

that after the Act was repealed a party could not institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated, there being no saving clause as to them.

If the Act of 1907 is nothing more than the creation of a Commission before which the State authorizes its creditors to sue and to have their claims established and adjusted, then it cannot amount to a contract irrevocable, and this Court has repeatedly so decided:

Beers vs. Arkansas, 20 How., 527;
Railroad vs. Tennessee, 101 U. S., 337;
Railroad vs. Alabama, 101 U. S., 832;
Hans vs. Louisiana, 134 U. S., 17;
Baltzer vs. North Carolina, 161 U. S., 245;
Ex Parte Alabama, 23 Am. Rep., 567.

In *In re Ayers*, 123 U. S., 507, it is said:

"Although the State may, at the inception of the contract, have consented as one of its conditions, to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity without any violation of the obligation of its contract in the constitutional sense."

And in *DeSaussure vs. Gaillard*, 127 U. S., 216, it is said:

"It was competent for the State of South Carolina either to grant or withhold the right to bring suits against the officers of the State for the recovery of money alleged to have been illegally exacted and wrongfully paid. If granted, the action is in substance, though not in name, an action against the State itself, just as an action permitted by the Acts of Congress on the subject against a collector of customs for the recovery of duties alleged to have been illegally exacted, and paid under protest, is an action against the United States, though nominally against the collector. In such cases, as the State may withhold all remedy, it may attach to the remedy it actually gives whatever conditions and limitations it chooses; and its own interpretation and application of its statutes on that subject given by

its own judicial tribunals are conclusive upon the parties seeking the benefit of them."

The State by this Act expressly devolves the right and duty upon the Commission to investigate, determine and ascertain the just liabilities against it held by these claimants, and does not authorize suits to be brought against it to establish such liabilities either in its own courts or in the Federal courts.

In the late case of *Smith vs. Reeves*, 178 U. S., 436, the Court, in construing a statute of California, held that by such statute the State had not consented to be sued except in its own courts; that it was competent for the State to couple with its consent to be sued, on account of taxes alleged to have been exacted under illegal assessments made by the State board, the condition that the suit be brought in one of its own courts, and that the contention that the State could not restrict its consent to be sued to actions brought in its own courts was incorrect. See, also, *Chandler vs. Dix*, 194 U. S., 590; *Maury vs. Commonwealth*, 92 Va., 310.

The Circuit Judge, as well as the Circuit Court of Appeals, proceeds upon the idea that the alleged creditors had acquired some vested right under the Act of 1907, and that some special trust in their favor had been fixed upon the funds held by the State Dispensary Commission. These parties, it is true, had made out a statement of their claims, and had them presented to and filed with the Commission and a roster had been arranged and a day fixed for the hearing of the respective claims, a distinct understanding being had upon the presentation of their claims that the same would be later investigated in an orderly manner. When the claims were called they declined, however, to obey the legal orders of the Commission. By the terms of the Act itself, this Commission had all the powers conferred upon the committee appointed to investigate the affairs of the State Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved January 24, 1906, and one of the special powers given by Section 3 of that Act was the authority to require the production of any

and all books, papers or other documents or writings which they should deem relevant to any investigation, and to require the persons in possession of said books, papers, etc., to produce the same before the committee; and, by Section 5 of the Act, the Commission had the power to withhold the payment of any claim of any creditor against the State Dispensary which they should deem advisable until the same was duly proven by the production of the books of original entry, and of all documents and correspondence relating to all their transactions with the State Dispensary, and to require any person or persons in possession of said books, documents, papers and correspondence to produce the same before the Commission in person. Yet this express authority was denied by the claimants, and they refused to proceed in the manner prescribed by the very tribunal created by the General Assembly before which they should establish and have their claims adjusted.

Subsequent, however, to the institution of the suit the Legislature, on the 21st of February, 1908, amended the Act of February 16, 1907, which Act is attached to the petition herein, and which, it is submitted, creates a court and makes such provisions as entirely destroy any idea of a trust created in favor of the beneficiaries.

If, therefore, the Act of 1907 was not a contract, or of such nature as would prevent the Legislature from modifying or amending such Act as it pleases, then the Act of 1908, which was brought to the attention of the Court, has made such provisions as are absolutely inconsistent with any attempt on the part of any court, State or Federal, to assume jurisdiction to declare and adjudge the amounts due by the State to the claimants, and to administer the fund, except as therein provided for.

The Supreme Court of the State of South Carolina, on the 14th of March, 1908, and a short while subsequent to the interlocutory order granting injunction and appointing receivers, in the case of the *State, ex rel. Lyon, Attorney-General, vs. The State Dispensary Commission*, held, substantially, that the Act of 1907 creating the State Dispensary and the remedies

therein provided for, was a purely voluntary act on the part of the Legislature of the State, and was subject to be repealed, and the allowance of the remedies therein provided for subject to be recalled at any time at the pleasure of the Legislature and in its discretion; that the State Dispensary was as much a part of the State government and as subject to as full investigation and control as the State Treasury; that the State Dispensary Commission were officers and agents of the State, and that the funds in their hands were the property of the State and held by them as its officers, subject to the control of the Legislature; and the possession of the State Dispensary Commission is the possession of the State. The construction so placed upon the statute by the highest court of the State, if followed by this Court, would demand that the interlocutory orders made by the Circuit Court and affirmed by the Circuit Court of Appeals be vacated and the bills of complaint dismissed.

The rule laid down by this Court by one of its latest decisions is "The highest Court of the State is, except in the matter of contracts, the ultimate tribunal to determine the meaning of its statute."

Batchel vs. Wilson, 204 U. S., 36.

We believe it sufficient to say, without a compilation of a vast number of citations, that the Federal courts will follow, in this case, the decision of the Supreme Court of the State of South Carolina construing the Act of 1907, unless this Court shall take the view that the Act of 1907 created a contract with the claimants, creditors of the State, which the State cannot, by subsequent legislation, interfere with.

Elmendorf vs. Taylor, 10 Wheat., 150;
Jefferson Branch Bank vs. Skelly, 1 Black, 436;
McCullough vs. Virginia, 172 U. S., 102;
Mobile Trans. Co. vs. Mobile, 187 U. S., 480;
Jack vs. Kansas, 199 U. S., 372;
Bacon vs. Texas, 163 U. S., 207;
Louisville Trust Co. vs. Cincinnati, 76 Fed., 296;
DeSaussure vs. Gaillard, 127 U. S., 216;
Lewis' Sutherland Stat. Constr., par. 313.

Where the Federal courts are not by rule bound to follow the decisions of the State courts in cases falling within the exception, they will consider such decisions upon the point in question and will incline to an agreement with the State courts.

Mead vs. Portland, 200 U. S., 163;
Blair vs. City of Chicago, 201 U. S., 400;
Copper Mining Co. vs. Territorial Board, etc., 206 U. S., 474;
Theological Seminary vs. Illinois, 188 U. S., 662;
Tampa Waterworks vs. Tampa, 199 U. S., 241;
Douglas vs. Kentucky, 168 U. S., 502.

The petitioners submit, finally:

That the fund in the hands of the Commission is property belonging to the State of South Carolina and in her possession, through her agents, the members of the Commission;

That these suits are, in effect, suits against the State, inasmuch as they must result in judgments being declared against the State upon contracts to which she is a party, and in the enforcement of such judgments taking away her property and applying it to the payment thereof; or else in judgments in her favor declaring these contracts void, or for less amounts than claimed;

That what is sought in these suits is not to require the Commission, as officers of the State, to perform duties imposed by the statute, but their purpose is to usurp the duties and functions of the Commission and to substitute in place of its judicial discretion that of the Circuit Court;

That if these be not suits against the State, then they are such proceedings that the State is a necessary or indispensable party thereto, without which the Court cannot proceed to judgment without necessarily and injuriously affecting the State in her financial interests and property rights. To protect this financial interest, and fulfill the duty imposed by the Constitution of preserving the net income arising from the past opera-

tions of this State department or institution—the State Dispensary—the State cannot stand idly by while the inquiry is proceeding and her funds being taken and applied to the payment of claims which she avers are illegal and fraudulent; but must, if she would perform her duty and protect her property, be forced into litigation upon the question of the validity and amount of the claims which it is alleged she owes to these whiskey houses.

J. FRASER LYON,
W. F. STEVENSON,
D. W. ROUNTREE,
B. L. ABNEY,
Counsel for Petitioners.

In the Supreme Court of the United States

October Term, 1908

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON et al. Petitioners,

vs.

WILSON DISTILLING COMPANY et al. and THE FLEISCHMANN COMPANY, Respondents.

Brief Against the Petition for Writ of Certiorari Submitted by T. Moultrie Mordecai, Frank Carter, Simeon Hyde and H. C. Chedester, Attorneys for Wilson Distilling Company, One of the Respondents.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON ET AL, *PETITIONERS.*

versus

WILSON DISTILLING COMPANY ET AL, and THE FLEISCHMAN COMPANY, *RESPONDENTS.*

BRIEF OF T. MOULTRIE MORDECAI, FRANK CARTER, SIMEON HYDE, AND H. C. CHEDESTER, ATTORNEYS FOR WILSON DISTILLING COMPANY, ONE OF THE RESPONDENTS SUBMITTED UPON APPLICATION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT.

The Respondents oppose the Application for Writ of Certiorari in this matter upon the following grounds:

1st. That the facts set forth in the Petition and Record do not justify it.

2nd: Because no question of importance is involved such as under the Practice, Rules and Decisions of this Court justify intervention by certiorari.

The Petitioners have set forth in their petition the facts upon which they rely for the Writ. As there is a difference between the Petitioners and Respondents as to what the facts are, we embody here a statement of these facts from the record.

STATEMENT OF FACTS.

In the year 1892 the General Assembly of South Carolina passed a Statute withdrawing from all its citizens the right to manufacture, sell, or otherwise deal in intoxicating liquors of all kinds, and undertook the conduct and manage-

ment of the business itself under a system known as the "State Dispensary."

By that Act, a Board of Control was established, consisting of the Governor, the Comptroller General and the Attorney General. To this Board was committed the duty and upon it was placed the responsibility of the conduct and management of the liquor business in South Carolina.

It is not necessary to recite this Act more fully. The purpose in referring to it is simply to state the composition of the Board which, at that time, was vested with the powers mentioned.

(Vol. 21, Statutes, page 62.)

It may be of importance to mention here that in the inception of this system the sum of fifty thousand dollars was appropriated by the State to constitute the first capital of the Institution, which amount has long since been repaid to the State and no further appropriation has at any time since been made.

In the year 1896, Vol. 22, page 124, the Constitution of the State Board of Control was changed so that it would consist thereafter of five members to be elected by the General Assembly; each of these members was required to give a bond of Ten Thousand Dollars and the entire liquor business was to be conducted and controlled by them.

They were to furnish liquors for sale to the County Dispensers, who were to remit the net proceeds of such sale to the State Treasurer. The bills for the purchases of liquor were to be paid by the State Treasurer, upon warrants drawn by the Commissioner, who was to be elected by the State Board of Control.

So the law stood until 1907 and it will readily be seen that the tendency was steadily towards the surrender on the part of the State of the management of the business and control of the affairs of the State Dispensary.

In that year, 1907, the General Assembly passed a Statute entitled "An Act to Declare the Law in reference to and to regulate the Manufacture, Sale, Use, Consumption, Possession, Transportation and Disposition of Alcoholic Liquors and Beverages within the State and to Police the same." By

the 47th Section of this Statute "the State Dispensary is hereby Abolished," and "all Acts and parts of Acts inconsistent with this Act are hereby repealed."

Taking this Section in connection with the history of the Dispensary Law and the management of the dispensary as hereinbefore stated, it appears that it was the Legislative purpose and intention to sever the State Dispensary from the State and to be done with it.

Possibly some history of the Dispensary and an investigation of its affairs and the scandals to which it had given rise, and the alleged corruption of which it had been the center, supplied the reason for this legislative action, and it is written in the Statutes of the State and the Proceedings before this Court that the State had reached a point when its further connection with the State Dispensary, as such, was to cease and determine.

The Statute last cited was approved on the 16th day of February, 1907. At the same session of the Legislature by an Act approved on the same day, entitled "An Act to provide for the Disposition of all Property connected with the State Dispensary and to wind up its affairs," a commission was created, to consist of five members and to be appointed by the Governor, to be known as The State Dispensary Commission.

Each of the members was required to give bond in the sum of $10,000. After providing how the commission should organize it is given authority and it is made its duty "to close out the entire business and property of the State Dispensary except real estate, and out of the proceeds of such sales and from the collection of debts due the dispensary, the commissioners are to pay all just liabilities at the earliest date practicable, and shall have the power to make such disposition of the stock on hand as their judgment may dictate," with certain other provisions not necessary to recite.

Realizing that after the payment of the debts of the institution there would probably be a balance remaining in the State Treasury, the result of the remittances made by the county dispensaries under the former law, it is provided in

Section 5, of this last named Act, "the said Commission shall pay to the State Treasurer, after deducting their compensations, and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities."

The Commission proceeded to sell all of the property except the real estate and to collect all assets due the State Dispensary, but having failed to pay out of the proceeds of such sales and collections the debts due to the complainants and others, these proceedings were filed.

A brief statement of the pleadings is necessary.

In the Wilson proceeding, after the formal allegations and the allegation of the indebtedness, by reason of sales made to the State Dispensary (see folios 2-6 of the record) it is alleged, in the language of the Statute last referred to, that "it was the duty of the Commission to close out the entire business and property," etc., and "to pay all the just liabilities of the Dispensary." A further allegation is that the Commission had realized upon these assets, but it failed and refused to pay complainant's debt, alleging that the assets were not sufficient to pay all of the debts of the Dispensary, and it is particularly alleged that the Commission proposes and will, unless restrained by order of the Court, put the funds in their hands into the State Treasury, thus depriving the complainants of their rights in the premises.

The answer to this complaint, after denying the allegations last above referred to, raised the questions that the Commission constituted a Court, and that this Court is without jurisdiction to control or restrain their action and also that they, the Commission, are officers of the State and that this action is to all intents and purposes a suit against the State, and that the State is an indispensable party.

The complaint in the Fleischman case alleged at greater length practically the same conditions as in the Wilson case. It is not necessary to abstract them, further than to say that reliance is placed upon the same Section of the Winding Up Statute as is referred to in the Wilson case.

The answer in the Fleischman case so far as the present hearing is concerned, raises the same questions, but with more particularity as to the position taken that the Commis-

sion constituted a court in that it is alleged at folio 68, that "to restrain the action of the Commission by the issuance of the injunction prayed for, would be in violation of Section 720 of the Revised Statutes of the United States."

The Circuit Judge issued a temporary injunction and rule to show cause, which was made permanent by his decree, dated March 3rd, 1908 (see Record Folios, 126 et seq).

The Legislature of South Carolina on February 24th, 1908, passed an Act directing the State Dispensary Commissioners to pay out of any funds in its hands from the profit or business of the State Dispensary, Fifteen Thousand Dollars ($15.-000.00), into the State Treasury, to be used for the purposes mentioned in the Act. The Commissioners having refused to pay this amount because of the Restraining Order issued in this proceeding by Judge Pritchard, on March 4th, 1908, a proceeding was instituted in the Supreme Court of South Carolina by the Attorney General of the State seeking to compel the payment of this money by Mandamus directed to the Commissioners. The Commissioners showed for Cause why the Writ should not issue, the pendency of this proceeding in the Circuit Court, and that they were restrained by the Order therein from paying out the funds, attaching to their answer a copy of the Bills and of the Restraining Order.

Thereupon the Supreme Court of South Carolina, upon the coming in of the Return and after argument, held that the suits in the Circuit Court were suits against the State and that the State was an indispensable and necessary party and the Act of February 16th, 1907, set out in the Petitioner's brief, did not create a trust and that the funds in the custody of the Commissioners were the property of the State, and in the hands of the Commissioners as the Agents of the State, and subject to legislative control under appropriation, and that the Order of the Circuit Court in these proceedings was void, as the Court was without jurisdiction in the premises, and that there was no reason why the Mandamus should not issue.

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, and after hearing full argument, that

Court sustained the judgment of the Circuit Court and remanded the Case for further proceedings in connection with the views therein expressed.

The points decided were:

First: That the suits in the Circuit Court were not suits against the State.

Second: That the State was not an indispensable party.

Third: That the Winding-up Commission created by the Act of 1907 did not constitute a Court, and the Court held, therefore, that the Decree of the Circuit Court appealed from should be affirmed and the case remanded for such further proceedings as might be in accordance with the terms expressed in the opinion.

ARGUMENT.

Conceding that the Supreme Court has power in certain cases to issue the Writ prayed for in this proceeding, even when the Appeal is from an interlocutory order of the Circuit Court, we call the attention of the Court to the well settled rule that such a Writ will only be issued in cases strongly requiring the exercise of this extraordinary power.

In the *American Construction Co. against Jacksonville, etc., R. R.*, 148 *United States*, 372, all the Acts of Congress with reference to the jurisdiction of the United States Courts in such matters are fully considered, and the Court says:

> "Accordingly, while there have been many applications to this court for writs of certiorari to the Circuit Court of Appeals under this provision, two only have been granted: the one in Lau Ow Bew's Case above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in Fabre, Petitioner, No. 1237 of the present term, an admiralty case, which presented an important question as to the rules of navigation, and in which the decree of the Circuit Court of Appeals for the Second Circuit reversed a decree of the District Judge and was dissented from by one of the three Circuit Judges, and in each of those cases the Circuit Court of Appeals had declined to certify the question to this court.

"There are much stronger reasons against the interposition of this court to review a decree made by the Circuit Court of Appeals, on an appeal from an interlocutory order, than in the case of a final decree. Before the Act of 1891, as has been seen, no interlocutory order was subject to appeal, except as involved in an appeal from a final decree. The only appeal from an interlocutory order under the Act of 1891 is that allowed by section 7 to the Circuit Court of Appeals, the same court to which an appeal lies from the final decree. The question whether a decree is an interlocutory or a final one is often nice and difficult, as appears by the cases collected in Keystone Co. v. Martin, 132 U. S., 91, and in McGourkey v. Toledo & Ohio Central Railway, 146 U. S., 536. Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right, and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters.

"Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

No further citation of authority would seem to be necessary to sustain the proposition that only in very rare cases will the power invoked in this proceeding be exercised, but we shall refer briefly to some of the other cases where the question has been considered and decided.

In Fields against the United States, 205 *United States*, 203, only three cases are recognized in which certiorari will lie. First, where the case is one of gravity; second, where there is a conflict between the decisions of State and Federal Courts, or between Federal Courts of different circuits; third, where the relation of the United States to foreign nations is involved, or where the case is one of general interest to the public.

Under the facts of the case now before the Court, none of the rules apply, as we shall hereafter show.

In Forsythe against Hammond, 166 U. S., 506, Mr. Justice Brewer construed the Acts of Congress relating to this subject, and holds that "this Court has power under the Act of 1891 to grant a Writ of Certiorari," "but," he says, "obviously a power so broad and comprehensive, if carelessly used, would defeat the very thought and purpose of the Act creating the courts of appeal. To exercise it might burden the docket of the court with cases which it was the intention of Congress to determine in the Courts of Appeal and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice. So it has been that the Court, while owning this power, has been chary of acting in respect to certiorari.

It is said "it is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instructions, and it is only when such questions are involved that the power of this Court to require a case, in which the judgment and decree of the Court of Appeals is not final, to be certified, can be properly invoked."

The cases cited in the foregoing opinion and also in *American Construction Co. v. Jacksonville Railway Company,* 148 *U. S.,* 383 (the only cases in which this power has been exercised) may be briefly considered.

In Re Lau Ow Bew, Petitioner, 141 *U. S.,* 583: It appears in this case that the matter in controversy in the Circuit Court of Appeals was the construction of the Chinese Restrictive Acts and their relation to the treaty between the United States and China, and the matter in dispute was whether a Chinese merchant domiciled in the United States who temporarily leaves this country for the purpose of business or pleasure, *animo revertendi,* is such a question of importance as would require the interference of the Supreme Court by certiorari, and when this same case came again before the Supreme Court upon the hearing of certiorari the power to issue the writ was again recognized and in view of the gravity and importance of the questions involved,

questions concerning a treaty between this country and a foreign power, the court considered and decided the controversy.

In Re Woods, 143 *U. S.*, 203. In that case the Writ was refused. It was a case in which it was sought to bring up a record by certiorari in order to determine the question whether the law respecting the liability of a master to his servant for injuries received in the course of his employment had been properly applied. The language of Chief Justice Fuller in delivering the opinion of the Court is suggestive as to the question involved in the present application. Said he: "But in the interest of jurisprudence and uniformity of decisions, to use the language of the eminent jurist and statesman who had charge of the Bill, 'provision was made in Section 6, for such supervision on our part as would tend to arrest diversity of judgment and guard against inadvertence of conclusion in controversies involving serious questions.'"

We have thus traced the rule as to the limitation placed by this court upon the exercise of its power in this regard, back from the later to the earlier cases, and have reached in this last citation the origin of the rule.

The power this placed in the Supreme Court will only be exercised to avoid the result of inadvertence on the part of the Circuit Court of Appeals in determining questions of gravity and importance, or preventing adversity of decision.

The only ground upon which this application can really be said to rest is that there is a conflict of decision between the State Supreme Court and the Circuit Court and Court of Appeals and the attempt is made to bring this case within the rule laid down, *supra*, by this court, that where such conflict exists this court will bring up the record and review the decision of the Circuit Court of Appeals.

Let us see how this conflict arose.

A reference to the statement of facts and to the record will show that after the proceedings in this case and after a preliminary injunction had been issued by the Circuit Judge an action was begun in the State Court by the Attorney General of the State, against the defendants constituting a commission to wind up the affairs of the dispensary, in order to obtain from the State Supreme Court an order directing the

payment by the latter of a certain sum of money appropriated from the dispensary funds by the legislature.

Now it is clear that the evident purpose of this action on the part of the authorities of the State was to obtain the construction of the various statutes hereinbefore referred to so far as such construction bore upon the questions before the Circuit Court in these proceedings and the State Court having concluded, as shown by the record, that the State was an indispensable party to any proceeding concerning the dispensary fund, it was sought to forestall the decision of the Circuit Court by that construction of the State Statute.

Inasmuch as one of the cases in which the right to *certiorari* on appeal from an interlocutory order, is based upon an alleged confusion between the decisions of the State and Federal Courts, and inasmuch as the petition in this case strongly urges that such confusion exists, we submit that the petitioners are not entitled to the writ, because whatever confusion or conflict has arisen and now exists between the State and Federal decisions is of their own procurement. They cannot, therefore, be in a position to invoke this writ because of this conflict of decision and the confusion which might arise therefrom in the sense in which it was invoked in the cases referred to in which the writ was granted.

As incidental to this question we take up now the discussion of the question whether the U. S. Courts are bound in this proceeding to follow the decision of the State Supreme Court rendered in a case instituted after this proceeding was begun, and after the questions involved had been passed upon by the United States Circuit Court in such proceeding.

In considering this question when presented to him, Judge Pritchard, at page 299 of the record, held as follows:

> "The Court having considered the opinion of the Supreme Court of South Carolina, which holds that this is a suit against the State and therefore inhibited by the Eleventh Amendment, is of the opinion that this Court is not bound by the principles enunciated therein,

inasmuch as it was rendered subsequent to the decision of this Court and necessarily involves a construction of the Constitution of the United States."

In this connection we submit in addition to this that the present controversy also involves the construction or at least the determination of the question as to what constitutes a court under Section 720 of the Revised Statutes of the United States, so that there are practically two Federal questions involved, besides the construction of the State Statute.

The Circuit Judge relied upon two leading authorities, one of which is *Burgess against Seligman*, 107 U. S., page 33, from which he quotes as follows:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the Statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal Courts are co-ordinate with, and not subordinate to, the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. * * * So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. * * *

"In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the Statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon and which we are now called upon to consider. It can hardly be contended that the

> Federal Court was to wait for the State Courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed, merely because the State Court has since adopted a different view."

And also the case of Pease against Peck, 18 Rwy., 599, where the Court says:

> "When the decisions of the State Court are not consistent we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist, also when a cause is got up in a State Court for the very purpose of anticipating our decision of a question known to be pending in this Court. Nor do we feel bound in any case in which a point is first raised in the Courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of the State."

The case in 107 U. S. has been followed by a very large number of cases both in the Circuit Courts and the Supreme Court of the United States, and some of the decisions of the Supreme Court will be referred it.

In *Louisville & Nashville R. R. Co. against Palmes,* 109 U. S., p. 244, it was held that the Federal question before the Court is whether the State Court gave effect to a State law which impairs the obligations of a contract; in deciding which, and in determining whether there was a contract, the Court is not necessarily governed by previous decisions of State Courts except where they have been so firmly established as to constitute a rule of property.

Said the Court (page 257):

> "It is undoubtedly true that the opinion of the Supreme Court of Florida in the case of Gonzales v. Sullivan, 16 Fla., 791, is not consistent with that which we have expressed upon some of the principal questions involved in this case. It did declare, speaking of the effect of the Internal Improvement Act of 1855, 'that an exemption from taxation resting in contract is annexed, by the terms of the law which created it, to the road itself, and not to the companies', and that by the act of 1872 the Pensacola and Louisville Railroad Company, as assignee of the Florida and Alabama Railroad, became entitled to the exemption, because 'the property passed, and with it, as an incident, went the exemption.'"

In *Buncombe County against Tommey*, 115 U. S., 122, the question arose as to whether a mechanic's lien could be enforced upon railroad property under the Statute law of North Carolina. While the particular Statute had never been finally construed by the Supreme Court of North Carolina, nevertheless that Court had given construction to it to the extent of a very clear indication of an opinion and the Supreme Court said:

> "But without accepting as conclusive an opinion delivered after the rights of the parties had become fixed (*citing Burgess against Seligman, supra*), we rest our interpretation of the Statute upon the ground that it has no reference to the work done, or materials furnished in the construction of railroads."

In another case in the same volume, 115 U. S., *Gibson v. Lyon*, at page 439, the Court says:

> "As a precedent the decision of the Supreme Court of the State, though single, is entitled to peculiar respect because of the questions decided arising upon the local law of the State, but it cannot have conclusive force in

the courts of the United States unless it has become a rule of property."

In Carroll County against Smith, 111 *U. S.*, 557, it was held that "the decision of the highest court of a State construing the State's Constitution is not binding upon this Court, as affecting the rights of citizens of other States in litigation here when it is in conflict with previous decisions of this court and when the rights which it affects here were acquired before it was made."

Said the Court:

> "The decision in *Hawkins v. Carroll County*, above referred to is not a judgment of the Supreme Court of Mississippi construing the Constitution and laws of the State, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a decision upon the very bonds here in suit, *pronounced after the controversy arose*, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the Courts of the United States in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts to determine for themselves what is the law of the State by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a Federal tribunal. Burgess v. Seligman, 107 U. S., 20, 30."

In Anderson against Santa Anna, 110 U. S., 356, the question arose upon the construction of the laws under which municipal corporations in a State were allowed to incur indebted-

ness and it was held "that where bonds were issued under the laws which had not at the time of issue been construed by the highest court of the State, its subsequent construction by them, is not conclusive on Federal Courts, though they will lean to an agreement of views with the State Court."

In this case the decision in the Burgess case, in 107 U. S., was referred to as having summed up all of the authorities up to that time and laid down the rule thus adopted in this case, that the United States Courts will not necessarily follow the decisions of State Courts made after the time of the transaction which is the subject of litigations.

In *Bolles v. Brimfield*, 120 *U. S.*, 759, citing *Anderson v. Santa Anna, supra*, the court says: It adheres to the rule upon the subject of following judgments of State Courts, with the qualification, however, that such doctrines may be announced by the State Court before the rights which are the subject of litigation in the Federal Court, accrues.

In *Bucher v. Cheshire R. R. Co.*, 125 U. S., 555, the question arose upon a Statute of the State of Massachusetts providing that a person engaged in traveling on the Sabbath Day could not recover against a corporation upon whose road he travels, for personal injury, which had been sustained by the decisions of Massachusetts in a large number of cases which were of sufficiently long standing to establish a rule, so far as they can establish it, and the Supreme Court followed the rule simply for those reasons, and even in this case there was a dissent by Mr. Justice Harlan, in which Mr. Justice Field concurred.

In *German Savings Bank against Franklin County*, 128 U. S., 526, the State law made a certain provision with reference to municipal bonds issued by a County and the State Courts had construed the law. In passing upon the question whether the Supreme Court should follow these decisions, the Court says:

> "This interpretation of Section 7 of the Act of April 16th, 1867, accompanied all bonds subsequently issued, into the hands of whoever took them, whether a *bona fide* holder or not, and this Court must recognize this de-

> cision of the Supreme Court of Illinois as an authoritative construction of the Statute made *before* the bonds were issued and to be followed by this Court." Citing a number of cases in which that principle was sustained.

Thus the principle is again emphasized that where the State law has been construed *before* the transaction occurs, and the parties have acted upon the faith of that decision, then the Supreme Court of the United States will not disturb that construction.

In considering the effect of a construction of a devise, the Supreme Court in Barker vs. Pittsburg, etc., R. R. Co., 166 U. S., page 83, says:

> "It becomes important, therefore, that the opinion of the Supreme Court of Pennsylvania in the former action of ejectment should be carefully examined and compared with the previous judgments of that Court."

The rule with reference to following the State Court when its decisions upon a point are numerous and settled and a rule of property is concerned is again considered in *Wade v. Travis Co.*, 174 U. S., 499, and to illustrate how faithfully the Supreme Court has adhered to the rule laid down in 107th U. S. and other cases, while a single decision made *after* a transaction will not always be followed, the rule is applied in a reversed state of the facts, in this, that having followed the Supreme Court of Illinois (20 Howard 1) in a line of decisions which settled a rule of property the Supreme Court adhered to that rule, although the Supreme Court of the State had subsequently overruled its own decision and had given the Act of the Legislature a different construction.

In a very full discussion of the rule in *Warburton v. White*, 176 U. S., 495, the result deduced is that there is no absolutely fixed rule which requires the Supreme Court of the United States to follow the decision of the State Court in considering a State Statute.

It was said that if the acts done were done in pursuance of the construction by the State Court, and such construction

had become a fixed rule of action or of property, the United States Court would follow it; but if not, the United States Court would not be relieved of the responsibility of putting its own interpretation upon the Statute.

In *Flanigan v. Sierra County*, 196 U. S., 553, it was held:

Whether a Statute of a State is, or is not, a revenue measure and how rights thereunder are affected by a repealing Statute, depends upon the construction of the Statutes, and where no Federal question exists, this court will lean to an agreement with the State Court.

In that case there was a conflict between the Supreme Court of California and the Circuit Court of Appeals, and the contention was that the conflict did not arise out of the construction of the Statute of the State, but as to the effect of the new Statute, considered by each court to be a repeal of a prior Statute, upon the rights of the litigants granted under a prior Statute.

The Circuit Court of Appeals first assumed, but did not decide that the Ordinance may have been a revenue measure, and the Supreme Court of California decided that the ordinance was a revenue measure.

It was contended that this question did not involve the construction of the Statute; but was merely the determination of a question that depended upon a principle of general law and not upon a positive Statute of the State. This being the contention of counsel, it was further said that: "In such case the courts of the United States are not required to follow the decision of the State Courts.

The court declined to adopt this view and went on to say:

> "If in any case we should lean to an agreement with the State Court, this is such a case. There is no Federal right involved. The question is one strictly of the State law, and the power of one of the municipalities of the State under that law. If we should yield to the contention of counsel we should give greater power to one of the municipalities of the State than the law of the State, as construed by the Supreme Court of the State, would give it."

So that even in that case the court decided that it was not bound to follow the decision of the State Court.

Finally, as showing the attitude of the Supreme Court to this question, we cite *Yazoo & Miss. Valley R. R. vs. Adams*, 181 U. S., 580.

In that case the question arose upon the construction of the State Statute with reference to the collection of taxes and that the Supreme Court of Mississippi having decided that all the taxes had accrued after the consolidation of certain roads and the company had thereby lost its exemption, and as this was the construction of the general tax laws of the State which were complex and difficult of interpretation, this Court would accept that construction and deny the petition for a rehearing.

This is very far from holding that the court will in all cases adopt the construction of the State Statute by the Supreme Court of the State; and in delivering the opinion of the court Mr. Justice Brown said:

> "Assuming that we may exercise an independent judgment respecting their (Statutes) construction, the examination we have given them leaves us in great doubt, whether the argument that the taxes had accrued prior to the consolidation is a sound one or not. The right asserted depends upon comparison and construction of such statutes; and the settled rule of this court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the State Statute which has been adopted by the court of last resort in that State."

Putting this last rule along side of the decisions in the Burgess case, *supra*, and other decisions which we have cited, it would seem that there would be no reason why the decision of the State Court should be followed, where it has been made not only after the rights have accrued, which are the subject of litigation, but also after a contrary interpretation by the courts of the United States.

UPON THE MERITS.

We take up the discussion of the questions raised in the petition and brief of the petitioners upon the merit of the controversy.

Three propositions are submitted by the petitioners:

First: Whether the suits in the Circuit Court are suits against the State?

Second: Whether the State is an indispensable party to such suits in such sense that the Court cannot proceed to judgment without materially affecting its rights and interest in the fund?

Third: Whether the Act of 1907 created a trust and divested the State of all control or disposition of the dispensary property?

FIRST.

Upon the first proposition we submit the following discussion with the authorities applicable to the question:

These are Not Suits Against the State.

We shall next discuss the question whether these are in reality suits against the State or only against the Commissioners named as defendants.

The attempt is not made here in any way to frustrate the purpose of the State in passing the legislation under discussion, nor to force the officers in charge of the fund, whatever may be their relation to the State, to do any act not contemplated by the Statutes. The decisions cited upon both sides of the question now being discussed while apparently opposed, are easily reconcilable when it is remembered that in one class of cases the effort was made to force certain officers to do what they were commanded by statute not to do, and in the other class of cases the purpose was to have carried out, through the agencies therein provided, that which the Statute enjoined and required.

It is to this latter class of cases that the proceedings, now

before this Court, belong and this position is fully justified by an examination of the pleadings in the case.

After reciting the provisions of the Statute and the debts incurred and the failure to pay the debts the complaints in both cases, allege that the debt is justly due and in the Fleischman case the allegation is made at length, and with great particularity, that the claim has been passed upon by the Commission, that the amounts allowed are practically correct, and that notwithstanding this ascertainment as to the justness of the claim and the validity of the obligation, the defendants refuse to pay it.

In other words, if there be any duty imposed upon the commission of a *quasi* judicial nature, involving any discretion, they have already exercised it, and to that extent, that is to the extent of its duty to the State, has performed it, and the only other duty remaining undone is the duty to the complainants and it is to enforce the performance of that duty to the complainants, the State thus being out of the question, the duty to it having been performed, that these proceedings are brought. Such being the case the authorities apply to which we shall hereafter refer, and which are referred to fully in the decision by the Supreme Court of South Carolina, and the Circuit Court, and which need not all be referred to here, to the effect that the State is not an indispensable party in such a proceeding and that the court has jurisdiction to proceed without it.

The two cases most often cited in support of the several propositions taken by the respective parties are *Louisiana* v. *Jumel*, 107 U. S., 711, *and Rolston* v. *Missouri*, 120 U. S., 390.

The decision in the Jumel case was based upon the fact that an ordinance forbade the payment of certain interest and withdrew from the officers of the State the means of carrying her contract into effect, and that the execution of the contract cannot be enforced, nor the relief sought be awarded, in a suit to which she is not a party, but which is brought against the officers who are merely obeying the positive orders of the supreme political power of the State.

On the other hand, in the Rolston case, the Court said:

"The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made the trustees are entitled to their decree; if it has not, a decree in their favor, as the case now stands, must be denied, but as the parties are all before the court and the suit is in equity, it may be restrained so as to determine what the trustees must do in order to fulfil the law, and under what circumstances the governor can be compelled to execute the assignment which has been provided for."

The same principle is laid down in many other cases cited in the decree below.

First of all, the case of *Osborne against the United States Bank*, 9 *Wheaton*, 739. In that case the suit was against the officer and was sustained for the very reason that the State could not be made a party under the Eleventh Amendment.

Here the subject matter was notes and money wrongfully withheld and it was held that the prohibition of the Eleventh Amendment does not extend to cases where the State is not a party on the record, though it may have an ultimate interest in the subject matter.

Referring again to the issues raised in these proceedings and the condition in which the matter is before the court, so that with reference to these claims there is no exercise of discretion required on the part of defendant, we cite the "*Board of Liquidation against McComb*," 92 U. S., 531, where it was held that "although a State without its consent can not be sued by an individual; nor can a court substitute its own discretion for that of the executive officers in matters belonging to their proper jurisdiction, yet when a plain official duty requiring no exercise of discretion is to be performed, and the performance is refused, any person will sustain injury by such refusal, may have a *mandamus* to compel its performance."

Again, it must be distinctly borne in mind throughout this discussion that the purpose of both proceedings now before the court was principally to prevent the distribution of the funds without discharging the plain obligation to the plain-

tiffs due them from the commission, and this was not seeking to defeat the purposes of the statutes, but rather to carry out that purpose fully and expeditiously and fairly.

Pennoyer against McConnaughy, 140 U. S. 1: In this case the plaintiff had certain contract rights from the State which were threatened to be invaded by the Land Commissioner, an officer of the State having in charge all land interests of the State, under an Act which was claimed to be unconstitutional, and the question was raised that the suit was really against the State although nominally against the Land Agent, and the court held that it was not, but that it might proceed against the Land Commissioner.

In the opinion Mr. Justice Lamar divides the cases in which this question has arisen into two classes, the first of which "is where the suit is brought against the officers of the State as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts "and the other class is where a suit is brought against defendants who claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under contract with the State.

> "Such suit, whether brought to recover money or property in the hands of such defendant, unlawfully taken by them in behalf of the State, or for compensation in damages or in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon the defendant the performance of a plain legal duty purely ministerial, is not, within the meaning of the Eleventh Amendment, an action against the State."

Citing *Osborne against the Bank, 9th Wheaton,* 738; *Davis against Gray,* 16 *Wallace,* 203; *Thomlinson vs. Branch,* 15 *Wallace,* 460; *Litchfield vs. Webster County,* 101 U. S., 773; *Allen vs. Baltimore, etc., R. R.,* 114 U. S., 311; *Board Liquidation vs. McComb,* 92 *U. S.,* 531; *Poindexter vs. Greenhow,* 114 U. S., 270.

Many of these authorities are cited in the later cases and are also cited in the opinion of the Supreme Court of South Carolina and of the Circuit Judge, and the principle runs all through them, that where the purpose of the proceeding runs along with the purpose of the State (as shown in its legislation), mandamus, or injunction, as the case may be, will lie to enforce a right or prevent a wrong, and that such proceeding will lie against the officer whose duty it is, under a Statute, to do the thing required, or not to do the thing sought to be enjoined.

It will serve no good purpose to prolong the discussion quoting at length all of these authorities, familiar to the court and recently made very familiar to counsel by reason of the repeated discussion of these questions, and we shall refer only to a few more.

In the case of *Tindall* v. *Wesley, in* 167 U. S., is precisely in point, even taking in view that the property in question in this case is the property of the State, strictly speaking.

Wesley, the plaintiff, claimed to be the owner of certain real estate in the City of Columbia, which was also claimed by South Carolina as its property, and was in the custody of the Secretary of State of South Carolina, who by law is the custodian of all state property.

The actual possession of the real estate in question was in another who was simply a watchman under the Secretary of State. Both defendants disclaimed any personal interest in the property and averred that the title and right of possession were in the State. In that case the question was distinctly raised that the suit was against the State within the meaning of the Eleventh Amendment and it was held that it was not a suit against the State, but simply an action to recover against those who were in possession of the property, and it was held that the Eleventh Amendment gave no immunity to officers or agents of States, in withholding the property of a citizen without authority of law, and when such officers or agents asserted that they are in rightful possession, they must make that assertion good upon it appearing, in a suit against them as individuals, that the legal title and right of possession are in the plaintiff.

In this case special reference is made to the case of *United States* v. *Lee*, 106 U. S., p. 218, and it is stated that the same principles apply as are enforced in cases in which the United States is a party.

In the latter case the doctrine that except where Congress has provided, the United States cannot be sued, was reaffirmed, but it as held that it had no applicatoin to officers and agents of the United States, who, as such, holding for public uses possession of property, are sued therefor by a person claiming to the owner thereof, or entitled thereto; but the lawfulness of that position, and the right or title of the United States to the property may, by a court of competent jurisdiction, be the subject matter of inquiry, and be adjudicated accordingly.

Here again many authorities are cited in support of the decision, and the same distinction clearly drawn.

Bearing in mind that the position we take is that these proceedings seek to require the performance of statutory duties enjoined upon the commission by injunction, that the fund may be kept intact for the purpose of carrying out the statute, the case last cited is very strong.

Said the Court:

> "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of citizens, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however, clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, *to examine whether this authority is right-*

fully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that he parties setting up such auhority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such auhority forbids any inquiry into the truth of the suggestion."

We call the attention of the court to the following cases, in further support of the position we have endeavored to maintain:

We refer particularly to the following very recent case:

In the Matter of Edward T. Young, Petitioner on Petition for Writ of Habeas Corpus and Certiorari.

(*Decided March* 23, 1908.)

In that case the State of Minnesota had passed a law imposing penalties upon railroad corporations and officers for violating certain freight rates, so severe that the court declared the regulations violative of the provisions of the Constitution of the United States, guaranteeing the equal protection of the laws. Pending the proceedings a temporary injunction was served upon certain officers of the State restraining them from attempting to enforce the law in question. This temporary injunction was served upon the Attorney General of the State, among others, and he appeared specially to move to set it aside, upon the ground that the Court had no jurisdiction over him as Attorney General, and that the suit was in reality against the State of Minnesota, which had not given its consent to such proceeding, and that therefore the court was without jurisdiction.

The Attorney General also demurred to the bill on the same grounds. The court overruled the motion and demurrer, and subsequently granted a preliminary injunction. The Attorney General, notwithstanding the injunction, proceeded to enforce the law and was fined for a contempt.

The matter then came before the Supreme Court of the United States on an application for habeas corpus and writ of certiorari.

Mr. Justice Peckham delivered the opinion of the court and reviewed all the authorities on the questions, whether this was a proceeding against the State prohibited by the Eleventh Amendment.

The petitions were dismissed—the court holding, among other things, as follows:

> "The case before the Circuit Court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant. It applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. *Hans v. Louisiana*, 134 *U. S.*, 1. It was adopted after the decision of this Court in *Chisolm v. Georgia*, 2 *Dall.*, 419 (A. D. 1793), where it was held that a State might be sued by a citizen of another State. Since that time there have been many cases decided in this Court involving the Eleventh Amendment, among them being *Osborne v. United States Bank*, 9 *Wheat.*, 738, 846, 857 (A. D. 1824), which held that the Amendment applied only to those suits in which the State was a party on the record.
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> "In the subsequent case of *Governor of Georgia v. Madrazo*, 1 *Pet.*, 110, 122, 123 (A. D. 1828), that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing *Osborn*

v. United States Bank, supra, said that where the claim was made, as in the case then before the court, against the Governor of Georgia as Governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the State and for slaves in possession of the State government), the State might be considered as a party on the record (p. 123), and therefore the suit could not be maintained.

"*Davis v. Gray*, 16 *Wall*, 203, 220, reiterates the rule of *Osborn v. United States Bank*, so far as concerns the right to enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

"In *Virginia Coupon Cases*, 114 U. S., 270, 296, (Poindexter v. Greenhow), it was adjudged that a suit against a tax collector who had refused coupons in payment of taxes, and, under color of a void law, was about to seize and sell the property of a tax payer for non-payment of his taxes, was a suit against him personally as a wrong-doer and not against the State.

"'*Hagood v. Southern*, 117 U. S., 52-67, decided that the bill was in substance a bill for the specific performance of a contract between the complainants and the State of South Carolina, and although the State was not in name made a party defendant, yet being the actual party to the alleged contract the performance of which was sought and the only party by whom it could be performed, the State was, in effect, a party to the suit, and it could not be maintained for that reason. The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State.

"The cases upon the subject were reviewed, and it was held, *in re Ayers*, 123 U. S., 443, that a bill in equity brought against officers of a State, who, as individuals, have no personal interest in the subject matter of the suit, and defend only as representing the State, where the relief prayed for, if done, would constitute a per-

formance by the State, of the alleged contract of the State, was a suit against the State (page 504), following in this respect *Hagood v. Southern, supra.*

"A suit of such nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constitute such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State.

"On the other hand *United States v. Lee,* 106 U. S., 196, determined that an individual in possession of real estate under the government of the U. S., which claimed to be its owner, was, nevertheless, properly sued by the plaintiff, as owner, to recover possession, and such suit was not one against the United States, although the individual in possession justified such possession under its authority. See also *Tindal v. Wesley,* 167 U. S., 204, to the same effect.

"In *Pennoyer v. McConnaughy,* 140 U. S., 1, 9, a suit against land commissioners of the State was said not to be against the State, although the complainants sought to restrain the defendants, officials of the State, from violating, under an unconstitutional act, the complainant's contract with the State, and thereby working irreparable damage to the property rights of the complainants. *Osborn v. United States Bank, supra,* was cited, and it was stated: 'But the general doctrine of Osborn v. Bank of the United States, that the Circuit Courts of the United States will restrain a State Officer from executing and unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from.' The same principle is decided in *Scott v. Donald,* 165 U. S., 58-67. And see *Missouri, &c., v. Missouri Railroad Commissioners,* 183. U. S., 53.

"The cases above cited do not include one exactly like this under discussion. They serve to illustrate the prin-

ciples upon which many cases have been decided. We have not cited all the cases, as we have not thought it necessary. But the injunction asked for in the *Ayers* case, 123 U. S. (supra), was to restrain the State officers from commencing suits under the act of May 12, 1887 alleged to be unconstitutional), in the name of the State and brought to *recover taxes for its use*, on the ground that if such suits were commenced, they would be a breach of a contract with the State. The injunction was declared illegal because the suit itself would not be entertained as it was one against the State to enforce its alleged contract. It was said, however, that if the court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits. (Page 487.) It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property.

"Whether the commencement of a suit could ever be regarded as an actionable injury to another, equivalent in some cases to a trespass such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362 (a rate case), was a suit against the members of a railroad commission (created under an act of the State of Texas) and the attorney general, all of whom were held suable, and that such suit was not one against the State. The commission was enjoined from enforcing the rates it had established under the act, and the attorney general was enjoined from instituting suits to recover penalties for failing to conform to the rates fixed by the commision under such act. It is true the statute in that case creating the board provided that suit might be maintained by any dissatisfied railroad company, or other party in interest, in a court of competent jurisdiction in Travis County, Texas, against the commission as defendant. This court held that such language permitted a suit in the United States Circuit Court for Western District of Texas, which embraced Travis

County, but it also held that, irrespective of that consent, the suit was not in effect a suit against the State (although the attorney general was enjoined), and therefore not prohibited under the amendment. It was said in the opinion, which was delivered by Mr. Justice Brewer, that the suit could not in any fair sense be considered a suit against the State (page 392), and the conclusion of the court was that the objection to the jurisdiction of the Circuit Court was not tenable whether that jurisdiction was rested (page 393) 'upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress and the sanction of the Constitution of the U. S.' Each of these grounds is effective and both are of equal force. *Union Pacific, &c. v. Mason Company*, 199 U. S., 160-166.

"In *Smyth v. Ames*, 169, *U. S.*, 466 (another rate case), it was again held that a suit against individuals, for the purpose of preventing them, as officers of the State, from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment to the injury of the rights of the plaintiff, was not a suit against a State within the meaning of the amendment. At page 518, in answer to the objection that the suit was really against the State, it was said, 'It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment.' The suit was to enjoin the enforcement of a statute of Nebraska because it was alleged to be unconstitutional, on account of the rate being too low to afford some compensation to the company, and contrary, therefore, to the Fourteenth Amendment."

"There was no special provision in the statute as to rates, making it the duty of the attorney general to enforce it, but under his general powers he had authority to ask for a mandamus to enforce such or any other law. *State of Nebraska ex rel, &c. v. The Fremont, &c., Railroad Co., 22 Neb.*, 313.

"The final decree enjoined the attorney general from bringing any suit (page 477) by way of injunction, mandamus, civil action or indictment, for the purpose of enforcing the provisions of the act. The fifth section of the act provided that an action might be brought by a railroad company in the Supreme Court of the State of Nebraska; but this court did not base its decision on that section when it held that a suit of the nature of that before it was not a suit against a State, although brought against individual State officers for the purpose of enjoining them from enforcing, either by civil proceeding or indictment, an unconstitutional enactment to the injury of the plaintiff's right. (Page 518.)

"This decision was reaffirmed in Prout v. Starr, 188 U. S., 537, 542.

"Attention is also directed to the case of *Missouri, &c. Ray. Co. v. Missouri R. R., &c., Commissioners*, 283 U. S., 53. That was a suit brought in a State Court of Missouri by the railroad commissioners of the State, who had the powers granted them by the statutes set forth in the report. Their suit was against te railroad company to compel it to discontinue certain charges it was making for crossing the Boonville bridge over the Missouri River. The defendant sought to remove the case to the Federal Court, which the plaintiffs resisted, and the State Court refused to remove on the ground that the real plaintiff was the State of Missouri, and it was proper to go behind the face of the record to determine that fact. In regular manner the case came here, and this court held that the State was not the real party plaintiff, and the case had, therefore, been properly removed from the State Court, whose judgment was thereupon reversed.

"Applying the same principles of construction to the removal act which had been applied to the Eleventh Amendment, it was said by this court that the State might be the real party plaintiff when the relief sought enures to it alone, and in whose favor the judgment or decree, if for the plaintiff, will effectively operate.

"Although the case is one arising under the removal act and does not involve the Eleventh Amendment, it, nevertheless, illustrates the question now before us, and reiterates the doctrine that the State is not a party to a suit simply because the State railroad commission is such party.

"The doctrine of *Smyth v. Ames* is also referred to and reiterated in *Gunter, Attorney General, v. Atlantic &c., Railroad Co.*, 200 U. S., 273, 283. See also *McNeill v. Southern Railway*, 202 U. S., 443, 539; *Mississippi Railroad Commission v. Illinois, &c., Railroad Co.*, 203 U. S., 335, 340.

The various authorities we have referred to furnish ample justification for the assertion that inidviduals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action.

SECOND.

Upon the second proposition we submit the following discussion with authorities:

The State Not an Indispensable Party.

We come now to a discussion of the question whether the State is an indispensable or necessary party to the proceedings; and the question whether the court can proceed to final judgment and do full justice to the parties, without the presence of the State.

First of all, let us see what under the statute the interest of the State is in the fund in question. Under the Act of February 17th, 1907, Section 5, the State reserves, or rather derives its interest in this fund, as the same is in the hands of the defendants, from the following provision: "Said Com-

mission shall pay to the State Treasurer, after deducting their compensation and other expenses, allowed by this Act, all surplus funds on hand, after paying all liabilities."

It is admitted that the entire liability of the State Dispensary was about Six Hundred Thousand Dollars, and that the funds in the hands of the Commissioners amount to about Eight Hundred Thousand Dollars. It also appears that the Fifty Thousand Dollars originally loaned by the State to the State Dispensary, with which to begin business, has been repaid and that the sum of One Hundred and Twenty Thousand Dollars, or thereabouts, which was in the State Treasury previous to the Act establishing this winding-up commission was paid to the commission by the State Treasurer.

The language in Section 5, *supra*, is "all surplus," funds on hand, after "paying all liabilities," and as these liabilities could be dcreased, the interest of the State would be increased, but to hold that the State was a necessary party because of this condition of affairs, would be to hold that the Legislature passed the Act in question with a view not to deal promptly and fairly with the creditors of the dispensary, but to save as much as possible out of the fund for the State, regardless of its just indebtedness, which cannot be true.

Again, can the court proceed to final judgment in this case without the State before it as a party? What has it to do? It has to ascertain through its own machinery or through the commission, what are just liabilities of the dispensary. Nothing more, nothing less, and the result or balance "all surplus funds" after such liabilities are paid, will belong to the State.

It is clearly a condition in which the State if it desires to see that this investigation is fairly made, so that it shall get most possible out of the fund, should come ino the case and be made a party. The State has parted with the entire fund by a declaration of trust executed by statute to the commissioners. Its interest is purely revisionary, the title being in the Commissioners in trust. This is shown by the fact before referred to that the treasurer actually paid to the commission the balance of One Hundred and Twenty

Thousand Dollars, in his hands at the time of the adoption of the Act.

Now, then, such being the facts and the reasonable deduction from them, and the state of the case, we refer to the case of *Cunningham against Maine and Brunswick Railroad*, 109 U. S., 446. The chief principle laid down is "that whenever it is clearly seen that a State is an indispensable party to enable the court according to the rules which governs its procedure, to grant the relief sought, it will refuse to take jurisdiction."

We observe that there is a total absence in this case of the elements so held to be essential in this decision.

There is no reason whatever why the court cannot call in all of its creditors, scale their claims, pay what is just, or require the Commission so to do, thus enforcing and not denying the terms of the Statute, and leave the balance in the hands of the Commission for the appropriation of the same under the terms of the statute.

The facts upon which the case of Cunningham is based are these:

The State had endorsed railroad bonds, taking a lien upon the property as security, and the company failed to pay interest upon the endorsed bonds, whereupon the governor of the State took possession and put the property in the hands of a receiver, who sold it to the State. The State thus became the actual owner of the property. The State took possession and took up the endorsed bonds, substituting the bonds of the State in their place. The holders of an issue of mortgage bonds issued by the Railroad Company, subsequently to those endorsed by the State but before the default in payment of the interest, filed a Bill in Equity to foreclose their own mortgage and set aside the sale, and to be let in as prior in lien, and for other relief affecting the property—setting forth the above facts; and made the governor and treasurer of the State parties.

These officers demurred, and it was held that the facts in the bill showed that the State "is so interested in the property that final relief cannot be granted without making it a party and the court is without jurisdiction."

Now in this case the facts are wholly different, because in the case cited the absolute title to the property was in the State and an effort was made to foreclose a prior lien. How could the title of the State be divested in a proceeding to which the State was not a party? else the railroad property would have to be sold subject to the title of the State.

In the present case the State has voluntarily declared a Trust by the Act of 1907, primarily in favor of the creditors, reserving to itself only such amount as should remain after the creditors have been fully satisfied. The title is by the Act of the State transferred to the Trustees, and the title can therefore be taken out of these Commissioners as Trustees in a proceeding to which they are parties whether the State be a party or not, and if this be so then the Court can administer the fund to the extent at least of preventing its waste and in preserving it for ultimate disposition according to the terms of the Statute. That is what this proceeding seeks to do.

The payment of the complainant's claims of course would follow, but the present purpose is to keep the fund intact until all claims can be gotten in and the rights of the State are in no way affected by such proceeding; and if the other view prevail that these claims have been adjusted and ought to be paid, then the State could not, if it were in the case, say anything against that position, because it was to effect that very result that the Statute was enacted.

Barney against Baltimore City, 6 *Wallace*, 280, is much relied on to maintain the position that the State is an indispensable party, but the facts in that case are widely different from those in the case at bar.

It was there held, as stated in the syllabus, that particular owners or tenants in common in real estate, of which partition is asked in equity, have an interest in the subject matter of the suit and in the relief sought, so intimately connected with that of their co-tenants, that if these cannot be subjected to the jurisdiction of the Court, the bill will be dismissed.

A single glance at the facts in the case show how wholly

inapplicable it is as an authority in the matter under discussion.

Tenants in common to real estate are entitled to possession and of course the Court could not grant a final decree in any disposition of the property or deal with it so as to affect the rights of tenants in common, who were not parties. The Court there cites the case of *Shield v. Barrow*, 17 *Howard*, 180, in which it is said.

> "A very able and satisfactory discussion of the whole subject is that they, that is to say, indispensable parties, are said to be persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity, and good conscience."

Taking this definition thus adopted in the Barney case and applying it to the facts in this case, let us see whether the State is an indispensable party to these proceedings.

Can a final decree be made without affecting the interest of the State? We say that it can, because the interest of the State is declared to be simply a surplus after just liabilities are ascertained, and the purpose of this proceeding is to ascertain the "just liabilities" and no more. The Court will not assume that there is any other purpose than to ascertain just what is due to creditors, justly and fairly. It will not do to say that the State is entitled to be present in the ascertainment of these amounts because we are not dealing with the question now as to whether the State is a proper party, or whether the State could not be a party if she sought to come in, but whether in her absence the interests of other parties can be ascertained. In other words, there is no claim on behalf of the State against this fund, which is to be adjudicated in these proceedings. The State has parted with the title and the title can be disposed of without the State. There is no account for the State filed with the Commission or in this Court, as in the case of the creditors. The State is not a creditor, but only entitled to the "surplus" after the creditors are paid. The State could seek no affirmative relief if

a party to the proceedings. It would simply stand by, while the investigation was being made. If it is said that the State has undertaken this investigation and that the powers of the former investigating committee have been by this Statute of Feb. 17, 1907, in express terms, conferred upon the "Winding-up Commission," we answer that that has nothing to do with the question, because by assuming jurisdiction the Court does not preclude the State from continuing to participate in such investigation of the claims, nor could it, if it so wished; but the point we make is that the Court has a right to proceed without the State in ascertaining what are the just liabilities, because the State has no claim to be asserted against the Commission, for any specific amount, and the State has no longer title to the fund.

Now, as to the second part of the definition: Can a final decree be made in this case, without the presence of the State, without leaving the controversy in such a condition that its final determination may be inconsistent with equity and good conscience? Certainly, there are no conflicting equities or rights between the creditors, nor liens to be adjusted, nor any right to be ascertained, except how much liquor various claimants sold the Dispensary, and how much money is due therefor, and this in the light of the fact that there is far more than enough to pay all, and that the State is entitled to the surplus. If these matters cannot be fully adjudicated in the proceedings as they now stand, it is inconceivable to suppose that they could be adjudicated before the Commission.

THIRD.

The Statute Created a Trust Fund.

In *McKee against Lamon*, 159 United States, 317, it was held that "where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter which may be enforced by a bill in equity if not by an action of law, and that the acceptance of money with notice of its ultimate destination, is sufficient to create a duty on

the part of the bailee to devote it to the purpose intended by the bailor, and that in the enforcement of such a trust, a Court of Equity may make such incidental orders as may be necessary for the proper distribution of the fund."

In *Cleaves against Jamison*, 182 U. S., 401, funds were placed in the possession of the Governing Committee of the Stock Exchange in trust, that it would see that the purposes of the deposit were fulfilled and that the money was paid out only in accordance with the terms of the Trust under which it was deposited," and it was held that there was no question that the fund became thereby a *trust fund* in the possession of the Governing Committee and that it must be disposed of in accordance with the trust. "The Committee occupied, from the time of the deposit, a fiduciary relation towards the parties depositing it and became a Trustee of the fund, charged with the duty of seeing that it was thus applied."

The foregoing principles thus laid down in these authorities are general, but if it be said that they have no application to the fund owned by a State, the answer is found in the decision of the Supreme Court of the United States in *Baring* vs. *Dabney*, 19 *Wallace*, 1. In that case it appeared that in 1812 the Legislature of South Carolina by Statute created a bank by the name of "The Bank of the State of South Carolina;" the capital was to consist of various stocks bonds and securities specified, then belonging to the State, the same being in fact all the funds, bonds and securities which the State owned. The Bank thus belonged to the State. The President and Directors were to be elected by the Legislature, and made a corporation and body politic. The faith of the State was pledged to the support of the bank. In December, 1821, by another Statute the future profits of the Bank were pledged and set apart for the payment of a certain six per cent. stock, which the State had previously issued. This Statute, as well as subsequent legislation, gave rise to the controversy in the case, and the question arose whether the Statute could appropriate assets of the Bank so as to divert them from the debts of the Bank to the debts of the State, and it was held that although the

stock was altogether owned by the State, if the Bank be insolvent, its assets cannot be appropriated by legislative act or otherwise, to pay the debts of the State as distinguished from the debts of the Bank; *that the assets of the bank were a trust fund, first applicable to the payment of the debts of the bank.*

It was said that "An Act of the Legislature requiring the managers of an insolvent bank belonging to the State, to hold its assets appropriated to the payment of certain specified debts, creates a trust in favor of the creditors holding said debts and, if assented to by them, amounts to a contract with them to carry out said trusts."

And to give effect to such legislation so substituting the debts of the bank for the debts of the State, would be to approve a law which was repugnant to the clause of the Constitution which prohibits a law impairing the obligation of contracts.

Now in this case the assets of the State Dispensary were originally owned by the State, but were pledged by the very act creating the dispensary from the very necessity of the case, to the payment of the debts of the dispensary. The creditors of the dispensary could never have sued the State for the recovery of the amounts due them, so long as the money remained in the Treasury of this State, but when the money was transferred by subsequent legislation to the commissioners, it went into their hands impressed, from the relation of the parties and the nature of the original contract, with a trust in favor of the creditors, which must be recognized in advance of the implied trust which still remained for the State, even if there had been no express trust for the State, as to any surplus after the creditors were paid, and the clear intention of the Statute is to give the creditors, first, a controlling lien upon this trust fund so in the hands of the Commissioners, otherwise the Statute is a vain excuse, giving the creditors no security whatever, and would evidence, what we do not think could be possible, a disposition on the part of the State to ignore and defeat their claims, in order that the State might reap a larger profit. Such,

we submit, cannot be the construction of the Statute; and even if it were the intention of the Legislature thus to defeat the claims of the creditors of the State by continuing to keep the money beyond their reach, such act would be unconstitutional. Good faith, as well as the legal obligation, required that that should be done which was intended to be done, to impress upon this fund a trust which should remain until the last dollar of just indebtedness had been paid, and that too, before the State could receive one dollar of the money.

The conclusion of the Circuit Judge, that the State was not an indispensable party, and could not claim the immunity provided in the Eleventh Amendment, because it had gone into the business of dealing in liquors preventing its citizens from engaging in the same business, is sustained by the reasoning of the decision in the *State of South Carolina against United States,* for the collection of internal revenue tax, where it was held that he state may control the liquor in South Carolina, but when it does so it engages in ordinary private business which is not by the mere fact that it is being conducted by a State, exempt it from the operation of the taxing power of the National Government.

The Internal Revenue tax on the sale of liquor is not a tax on property or profits of a business, but a charge on the business irrespective of the property used therein, or the profits realized therefrom. The exemption of the State Agencies from National taxation is limited to those which are of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business and in the case cited—Barings against Dabney, 19 Wallace 1, the State was actually the owner of the entire assets of a bank and had by legislation endeavored to use the assets for the payment of the debts of the State as against the debts of the Bank, and the Court denying this right proceed to administer the assets, the state not being a party to the cause.

In Chaffraix v. Board of Liquidation and others, 11 *Fed. Rep.,* 638, it was held:

> "The circuit court has jurisdiction to prevent by injunction the officers of a state from diverting a fund

collected by taxation and set apart under a statute of that state to pay certain bonded indebtedness of said state, to the end that said fund may be preserved intact until the rights of the parties and the interests of the state, if any she has, may be determined contradictorily. Such action is not forbidden by the eleventh amendment of the constitution of the United States, and is necessary for the proper enforcement of section 10 of article 1. of the same instrument. Pardee, C. J."

In *Swarsey v. N. C., in 71 North Carolina,* p— is an elaborate statement of the law. In that case the state had created a railroad and had authorized it to issue bonds and pledge the stock of the company to secure the payment of the bonds. The bondholders undertook to reach the stock. It was contended that the State of North Carolina having an interest in this stock was a necessary party and that therefore the suit could not be maintained under the eleventh amendment.

Said the Court:,"If a state could be brought into court it undoubtedly should be made a party before a decree is rendered, but since the case of Osborne against the Bank, 9 *Wheaton*, 739, it has been the uniform practice of the Courts of the United States to take jurisdiction of causes affecting the property of a State in the hands of its agents, without making the State a party, when the property or the agent, is within the jurisdiction; in such case the court acts through the instrumentality of the property or the agent."

This brings us within the line of the cases cited in support of the position that the officers of the State are really those who are the proper defendants in this case, who have the custody of the fund and the disposition of it under a statute, and that court can fully administer the fund without the presence of the State.

In the actions now before the Court the plaintiffs allege that there are specific amounts due them; in the Fleischman case; that such amounts have been passed upon by the Commission (see folio 29).

Now under the express terms of the Statute, these are

due from a trustee to a *cestui que trust*, and the presence of the State as a *cestui que trust* is not necessary to determine that issue. While these are not *aliquot* parts of a fund, they are fixed and determined, and the State is not entitled until they are paid.

> "When each *cestui que trust* is entitled to an *aliquot* share of an ascertained fund, he may sue alone for any accounting as to his interest, and the *cestui que trustent* entitled to the other *aliquot* shares are not necessary parties. (22 Encl. Pl. & Pr. 100, and cases cited.)
>
> "That the State cannot be made a party in a case where it is concerned, is a sufficient reason for the omission to do so, and the case may proceed to decree against her officers in all respects as if she were a party to the record."

Davis v. Gray, 16 Wall. 203, *Citing Osborn v. Bank*, *supra*.

The decision of the Supreme Court of South Carolina in *Water Power Company v. Electric Company*, 43 *S. C.*, 154, where it was held that the State was an indispensable party was based upon the fact that the State had reserved certain rights to water power when it conveyed the power to a Company, and the act of the State was drawn in question. In the case at bar, it is the failure of the State's agents to obey the State which forms the basis of the action. Referring to *In re Ayers*, 123 U. S. 500, the Court said that the distinction lay between that case and a case where the officers were wrong-doers, personally and individually, against whom the Complainants had a clear right of action, and that no other parties were necessary.

And in the other South Carolina case of *Lord v. Bates*, 48 S. C., 95, it was said that the State was not a necessary party to an application by a private citizen for mandamus to enforce a private right, and this was an application to Compel the State Treasurer by mandamus to fund certain bonds of the State under a Statute providing for such funding on certain conditions, the Construction of the Statute being the matter before the Court, and the result of the

case being to increase or not to increase the debt of the State, a matter in which it was vitally interested.

As further illustrative of the position that this is a trust fund in the hands of the commissioners, see *Maenhaut et al against City of New Orleans et al, 2nd Woods,* 108.

In that case money was collected to pay the interest on bonds, issued by the municipal corporation, under an act which provided that a tax to pay the interest should be levied, and enacted safeguards to secure the levy and collection, on the faith of which legislation the bonds were sold. This act was held a contract with the bondholders, the substantial performance of which they are entitled to exact, and it was further held that the money collected to pay the interest on said bonds levied, collected and set apart according to the provision of the act, is a trust fund for that purpose, and the municipal corporation may be enjoined from using it for any other purpose without the consent of the bondholders.

See also in this connection, *Case v. Beauregard,* 101 U. S., 688.

In the case of *"Board of Liquidation against McComb,* 92, U. S., 531; *will* be found an elaborate consideration of the entire doctrine."

In that case it was held that although the State could not be sued by an individual, and that a Court could not substitute its own discretion for that of Executive officers in matters belonging to their proper jurisdiction, yet when a plain official duty requiring no exercise of discretion is to be performed and performance is refused, any person who will sustain personal injury by such refusal may have Mandamus to compel its performance, and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.

The authorities cited in the Petitioner's brief in support of the proposition that the State is an indispenable party may be briefly noticed.

It is said in "Daniell's Chancery Pleading and Practice" Volume 1, Page 243;

"Moreover in some cases where the fund, the subject of the suit has been ascertained and appropriated, the Court has dispensed with the appearance of a personal representative to the testator, by whose will the fund has been bequeathed."

And in *Gregory against Stetson*, 133 U. S., 585, it appears "that the property upon which that part of the case was decided was that a Court cannot adjudicate directly upon a person's rights without having him *actually or constructively* before it, and it is stated that this principle is fundamental.

An examination of the legislation which vested this fund in the State Dispensary Commissions, shows that they represented the State to the extent of any surplus that may remain after the just liabilities of the State have been paid. In other words that it being their duty to see that the surplus was paid to the State after the debts contracted for the purchase of liquor had been extinguished, the State was and is, through them, constructively before the Court, as the record now stands.

The State could not be made a party as such, but the State can designate officers and agents to represent her so that she is represented in the proceeding by the officers of her own creation and appointment.

In *Arthur against Hughes*, 4 *Beavan*, one of the cases cited in Daniell's Chancery Pleading *supra.*, it was held that where an ascertained fund was remitted from abroad by an Executor to a person in England to distribute between legatees, that the Court could determine the right of the legatees without having a legal personal representative before the Court.

To avoid the rule thus clearly established in the older cases and affirmed at least in analogous cases of later date, the effort is made here to persuade the Court that there is no specific appropriation of fund for these creditors of the State, but that the amount is uncertain and cannot be made certain except in a proceeding to which the State is a party.

We maintain that under the Act of 1907 there is a clear specific appropriation of all funds derived from the sales of liquor to the payment of the debts contracted in its pur-

chase, and that while the commissioners were to ascertain and determine which of the claims against the State were just the State herself reserved no interest whatever in the fund until these liabilities had been paid.

In other words the creditors of the State were to be paid out of the fund so long as the fund lasted until such debts were paid, and if a surplus, the surplus then to go to the State.

The presence of the State, therefore, was only necessary to fix the amount to be paid the creditors and so long as the Commissioners are before the Court the State is represented by and through them and her interests can be thus fully protected.

In discussing this question the petitioner's counsel, at page 11 of their brief, quote from the opinion of the Circuit Court of Appeals, in which that Court argues that where the duties of the Trustees are clearly defined, the trustor is not even a necessary party to a suit brought to compel the trustees to discharge their duty, and reference is also made to what was said in the opinion of the Circuit Court of Appeals with reference to an assignment for the benefit of creditors and the similarity of the Act creating the Dispensary Commission to such deed of assignment.

So far as the latter suggestion is concerned, it is enough to say that the court referred to an assignment for creditors simply by way of illustration and comparison. It is true that the authorities cited by the petitioners seem to hold that in an action to enforce a trust under an assignment for creditors the assignor must be a party, if the deed provides that the surplus shall go to him, but the illustration adopted by the Circuit Court of Appeals is nevertheless appropriate to the case in hand, because of the peculiar conditions existing at the time of the passage of the Statutes under consideration.

The most casual reading of the Statutes will show that the primary object was to pay the debt incurred in the purchase of the liquor, and that the entire fund was assigned to the Commissioners for that purpose. Their primary duty was to ascertain the debts and pay them, and it is submitted that under the authorities cited, a right of action must necessarily

be implied in the creditors to recover the amounts due them, in an action against the Trustees of the fund, especially after these debts have been ascertained by them.

In support of their contention the petitioners claim that the debts sought to be collected in this proceeding are debts of the State, and that they, the Commissioners, represent the State. If this be the correct view, then it is submitted the State is constructively before the Court, and that is all that is required by the rule laid down by the authorities cited in petitioners' brief.

Besides *Gregory vs. Stetson*, already referred to, the petitioners refer to the case of *Minnesota against Northern Securities Co.*, 184 *U. S.*, 235, in which the rule is "that those are to be made parties who are either legally or beneficially interested, so that a complete decree may be made."

If, therefore, the object of the winding-up Statute in the case before the Court was to ascertain primarily what debts were due, and the Commissioners themselves were to determine this, as representing (necessarily by virtue of their office and powers) the State—as they claim—then the State as a beneficiary of the fund, if it is a beneficiary, is "constructively" before the Court as the matter now stands.

The test as applied in *Cunningham against Macon R. R. Co.*, 106 *U. S.*, 446, cited in petitioners' brief, is whether the presence of the party is indispensable in order to enable the Court, according to the rules which govern its proceeding, to grant the relief sought.

In *Christian v. Atlantic, etc., R. R. Co.*, 133 *U. S.*, 233, it is said that the State is an indispensable party to any proceeding in Equity in which its property is sought to be taken and subjected to the payment of its debts, and it appears in the case now before the Court, upon the very face of the record, that the plaintiffs are not attempting to take the property of the State; the State has itself appropriated these funds specifically to the payment of such liabilities as shall be found to be just, and has relinquished its title to the property in dispute absolutely and irrevocably, and is only exacting that the surplus shall be paid to it after it has been determined what are the just liabilities.

In *Williams v. Bankheard*, 19 *Wallace*, 571, and in *Barney v. Baltimore*, 6 *Wallace*, 280, the test is: will an absent party be directly affected by a decree made in his absence? And a complete answer to the objection now made to the absence of the State, and the assertion that the State is an indispensable party is, that the State cannot be affected by the payment of the just debts and liabilities of the State Dispensary, because under the terms of the Statute those liabilities are to be provided for and paid at all events.

In other words, even in the light thrown upon the question by these authorties, the interest of the State cannot suffer or be affected by a determination in the forum sought by the petitioners on the question of the justness of their debts, that being, as has been shown, the primary object of the Statute.

It was this view which was taken by the Circuit Court of Appeals, and none of the authorities cited by the petitioners show that there was error in so holding.

Again, the same doctrine, that it is sufficient if the party, whose absence constitutes the ground of complaint, is constructively before the Court, is clearly laid down in the cases cited by the petitioners in *Chadbourne v. Coe*, 45 *Fed.*, 822, and *Ribon v. Railroad Co.*, 16 *Walace*, 450. It is said there that the Court should not proceed unless the party is actually or constructively before it, and so on in effect, if not in express terms, it is decided in all of the authorities cited in the petitioners' brief.

In other words, the extent to which the Courts have gone is that, though they will not proceed to pass upon the rights of absent defendants, who have a substantial interest in the thing in controversy, they will do so, if such defendants are constructively before the Courts, so that their interests must necessarily be provided for in any decree which may be made as between the parties then and there before the Court.

The opinion of the Circuit Court of Appeals has presented this matter in another aspect, which is very suggestive, and which is practically conclusive of the question now under discussion. Briefly stated, it is this: There is no doubt but that the State can now come in and be made a party for the protection of whatever interests she may have in this fund,

if so minded. Can the State remain out of the case having by previous legislation gone into the liquor business, and having conducted it for years, and now fall back, as an excuse for her voluntary absence, upon the protection offered by the provision of the Eleventh Amendment to the Constitution? The conclusive answer is found in the case cited in the opinion below, *Bank of United States against Planters' Bank of Georgia*, 9th Wheaton, (22 United States) 904, in which it is said:

> "It is, we think, a sound principle that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen."

And we refer also to another case cited by the Circuit Court of Appeals in the same connection. *South Carolina vs. United States, 199 U. S., 437, in which it was said:*

> "These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

Upon this third question raised by the Petition as to whether the Act of 1907 created a Trust, and divested the State of all control or disposition of the State Dispensary property, we submit that this has been covered in what has already been said, and it only remains to discuss the brief of petitioners on this question.

The petitioners maintain (page 18) that the act of 1907 under which the Commission was appointed, did not create a trust, and that it did not divest the State of all control or disposal of the State Dispensary Fund, so that the act next hereinafter referred to would be operative.

To support this position reliance is placed upon certain Constitutional provisions, now for the first time invoked in the cause, with reference to the ascertainment and payment of claims against the state (page 19).

Giving full effect to the South Carolina Case of *Bank vs. State*, 60 S. C., 465, there cited, which holds that under the Statute under consideration in that case claimants had only a right to have their claims established, and to sue upon them, and that such claims were not thereby finally validated, beyond further question, we submit that the statute in this case is very different. Here the Commission under the act of 1907, were not only to investigate the claims, and to pass on them, but also to pay them, without further action of the Legislature, out of a fund which was assigned to them by the Statute for that purpose, and this surely created a trust in favor of the creditors, as has been seen.

Here is the distinction between the case at bar and the class of claims contemplated by the Constitutional Provisions relied on; and also when the case also relied on, of *Campbell vs. Sanders*, 43 S. C., 577, was decided.

A mere power to investigate his claim would not, of course, create a trust in favor of the creditor, or a legislative contract with him. But the case must be wholly different, when the Legislature, recognizing that there is a contract, appropriates money, by handing it over to Commissioners charged not only with the duty to investigate the claims, but also clothed with the power to pay out the trust funds to the beneficiaries provided for as a class in the statute.

Reference is also made in petitioner's brief to *South Carolina vs. Gaillard*, 101 U. S., 433, and it is claimed that that case is in point. It will be at once observed, however, that the contention there was that the act permitting the taxpayer to tender Bills of the Bank of the State in payment of taxes, and have them sealed up and deposited to await the determination of the question whether they were to be received for taxes, constituted a new contract, while in the present case the act of 1907, creating the Winding-up Commission, defendants herein provided that the Commission should itself pay the just liabilities of the State incurred in

the liquor business out of the assets assigned to it by the Statute.

The creditors, therefore, had an interest in this assigned fund, if their claims constituted just liabilities of the State Dispensary, and no subsequent legislation could defeat that right, and the Circuit Court had taken jurisdiction, and had jurisdiction of a cause which was to determine whether such claims were then and there to be paid.

We are dealing now with the question whether the money in the hands of the defendants constituted a trust fund. As to the effect of the act of 1908, which was passed after this proceeding was commenced, and which attempted to lessen the power of the Commission, and change the status, we shall have a brief discussion of the end of this division of the argument.

The petitioner cites a number of cases (page 22), to the effect that if this act of 1907 created a Commission, before which the State authorizes its creditors to sue, and to have their claims established and adjusted, then it cannot amount to a contract irrevocable.

An examination of these cases throws very little light upon the question now before this Court, because the Statutes there considered provided simply for the investigation of claims, and not for the payment of them out of a fund specifically provided for that purpose.

We shall take up these cases, and briefly see what was involved in them, and the point decided.

Beers v. Arkansas, 20 *Harvard*, 517.

Here it was held that permission to bring the suit was not a contract, which could not be withdrawn by subsequent legislation. That is not the question here. In this case money has actually been appropriated for the payment of the debt.

Railroad v. Tennessee, 101 *U. S.*, 377.

Here it was held that a Statute which gave a right of action against a State could be repealed, but it does not appear that the right to sue was a part of the original contract, or that the Act giving the right to sue was coupled with a leg-

islative declaration that money should be held in trust to await the result.

Railroad v. Alabama, 101 *U. S.*, 832.

In this case the Statute gave the right of action against the State, and was afterwards repealed. *Held* that this deprived the Court of jurisdiction, but did not impair the obligation of the contract.

The difference between this case and the one under discussion is obvious, as stated above.

Hans v. Louisiana, 134 *U. S.*, 17.

This case decided two points—That a State cannot be sued by one of its own citizens in a Federal Court without its consent, and that when a State attempted to violate property rights, acquired under a contract with it, such attempt may be judicially resisted, and any law impairing the obligation of such a contract is void and powerless to affect such rights.

In re Ayers, 123 *U. S.*, 507.

Here also was a case involving the Statute of Virginia as to tendering coupons of State bonds for taxes, and the bringing of suits to recover the taxes from person so tendering them, and can have no reference to this case.

DeSaussure v. Gaillard, 127 *U. S.*, 216.

In this case it was held only that when the State gives the right of action against one of its officers, which is practically against the State it may provide for certain limitations and restrictions upon the exercise of the right, which is simply providing for a remedy against the State or its officers, and does not constitute a contract.

Smith v. Reeves, 178 *U. S.*, 436.

The point decided here was that when the State permitted one who complained of the assessment of his property for taxes, to pay the taxes, and bring an action against the Treasurer to recover the amount claimed to have been illegally assessed, the State could couple with the consent to be sued, a condition that the suit be brought in one of her own Courts.

Now it appears from the record that the legislature of South Carolina passed a Statute in 1908, which attempted to enlarge the powers of the Commission and give it more

of the nature and functions of a Court than had been conferred upon it by previous legislation. We submit that this Act of 1908 can affect the questions now before the Court:

The Amendment of 1908.

The decision of the State Supreme Court in upholding the act amending the "Winding-up Act," adopted by the General Assembly on February 24th, 1908, after these proceedings had been begun in the Circuit Court, and only a few days before the decision of the Circuit Judge was announced, fails to recognize and enforce the principle that such amendment is contrary to the Constitution of the United States.

This is essentially a question which this Court will consider whenever it is properly raised, and will disregard the decision of the State Court if it appear that the statute by that Court violates the provisions of the Federal Constitution.

It appears at page 294 of the record that the State Court gave full force and effect to this amendatory statute, and it also appears, at page 296 and 7, in the traverse filed by the plaintiffs to the return of the defendants, that the defendants set up in the first paragraph of their traverse that they are advised and verily believe said act (that is the first act creating the "Winding-up Commission) and the acceptance by the defendants, constituting the State Dispensary Commission, as trustees of the trust created by said act, and the acceptance by the complainants and the other creditors of said State Dispensary as *cestuis que trustent* of the benefits of the trust so created, constitute a valid, binding and irrepealable contract within the meaning and protection of the Constitution of the United States.

And in the second paragraph the plaintiffs specifically assail the said amendatory act of 1908 as a violation of the provisions of Art. 1, Sect. 10, of the Constitution of the United States and Article 14, Section 1, of the amendments thereof, upon the ground that said act impairs, and attempts to impair, the obligation of the contract set out in the 1st paragraph, and deprives, and attempts to deprive, the complainants of their property without due process of law, and

denies, and attempts to deny, them the equal protection of the law.

It is to be observed that the first act creating the commission specifically directed them to pay the just liabilities of the State Dispensary; and the second act amendatory thereof, passed after the plaintiffs had filed accounts with the commission, and had had them adjudicated, and when the only thing left to be done was to pay them, gives the commission very large powers to pass upon, fix and determine all claims against the State growing out of dealings with the Dispensary; and it directs it to pay only such claims as have been submitted to and determined by it, and no others, out of the assets of the Dispensary.

It is true it does give the claimants the right to appeal to the Supreme Court as in cases at law and regulates the practice on such appeals.

This Court we submit had jurisdiction of these complainants and defendants before this statute was passed, and had it for the purpose of enforcing the provision of the former statute upon a state of facts crystallized before the proceeding was brought. The rights of these complainants, therefore, were fixed, fisrt under the Statute of 1907, *and secondly by the orders of this Court in this proceeding.*

An attempt, therefore, was made to deny and deprive the Circuit Court of its jurisdiction by passing the other act.

Now the new act would require these complainants, if it affects them at all, to go before the commission again and try their case, and appeal to the Supreme Court, and wait until in the usual course of business in that tribunal, the case might be heard and the decision handed down.

The new act, therefore, was a denial of the rights which the complainants had under the old contract, that is, to proceed to the office of the commissioners and receive their money upon claims which had been passed upon by them, and it impaired materially the rights given to the plaintiff under the act of 1907, which were the rights of the *cestuis que trustent*, to demand of the trustees a prompt and faithful performance of their duty.

In *Antoni v. Greenhow*, 107 U. S., 769, the same process

was adopted by the State of Virginia. Proceedings were pending in the courts to enforce the payment of coupons upon state bonds by tendering them for taxes. The legislature adopted an amendment of the statute under which this was permitted, which amendment provided another mode of procedure than that in force when the coupons were issued. The Supreme Court held that the new section furnished an adequate and efficacious remedy, substantially equivalent to that which existed at the date when the coupons were issued, and *therefore* the rights of the holder of them, in case the Collector refused to receive them for taxes, can be maintained and enforced and that the obligation of his contract with the state was not thereby impaired.

The difference between that case and the one now before the Court is obvious. The plaintiffs here are absolutely deprived of their money until they have complied with the regulations and gone through a process not included within the terms of the statute which created the trust of which they are the beneficiaries.

Pennoyer v. McConnaughy, 140 *U. S.*, 1.

An Act of the legislature of Oregon of Jany 17, 1879, repealed an act of that State of October 26th, 1870, both acts concerning the swamp and overflowed lands, and the second act made new regulations concerning the same. An application to purchase some of these lands had been filed after the first act before the enactment of the second. It was held, first, that such an application could not be perfected by making the payments required by the act of 1870 after its repeal, but within the time prescribed by that act, and the title thus acquired was good against the State; it was further held that the act of the legislature of 1887 declaring all certificates of sale of swamp or overflowed lands void, on which 20 per cent. of the purchase price was not paid prior to January 7th, 1879, and required the Board of Commissioners to cancel such certificates impaired the contract made by the State with the defendant in error, under the act of October 26th, 1870, as that act and the act of 1879 are construed by the Court, and therefore in

violation of Art. 1, Sect. 10, of the Constitution of the United States.

See also *Piqua Branch of State Bank, against Knoop*, 16 How. 369.

Osborne v. *United States Bank*, 9 Wheaton, 738.

Davis vs. Gray, 16 *Wallace*, 203.

FOURTH.

While the point is not raised in this application it was raised below under Section 720, Revised Statutes Injunction would not lie to restrain the Commissioners from paying out the fund in their hands upon the ground that under the Statute creating the Commission a Court was created.

While this question is not distinctly raised in the present application, we desire to submit a brief upon that question as it is, to some extent, at least incidentally involved in the present inquiry.

Defendants Not a Court.

There have been many commissions and boards and other similar bodies established by the State Legislation throughout the years and the question has often arisen in this and other courts as to whether these constitute courts, as the term is usually understood?

If we go back to Blackstone's Commentaries we find that in Volume 3, page 25, a court is defined in modern signification "to consist of at least three constituent parts, the *actus*, the *reus* and the *judax*—the actus, or plaintiff, complains of an injury done; the reus, or defendant, is called upon to make satisfaction for it, and the judax, or judiciary power, is to examine the truth of the fact and if any injury appears to have been done to ascertain and by its officers apply the remedy."

It would be difficult to find a definition which more clearly describes a court in all its parts and all its functions.

In *United States against Ferreira*, 13 Howard, 373, the question arose whether the District Judge of the United States for Florida who by Act of Congress was directed to adjudicate the claims for injuries suffered by the inhabitants of Florida by operation of the American Army in Florida—

which claims were to be paid if the Secretary of the Treasury should on report of the evidence deem it equitable, constituted a court, and it was held that the authority given him was not to exercise any of the judicial powers of the United States under the Constitution, but that the Judge acted as a "Commissioner," and no appeal lay from his decision to the Supreme Court.

The question is very elaborately discussed and the want of power as a court was held to exist because of the provisions of the Constitution of the United States. This authority naturally leads us to consider the Constitution of South Carolina in its bearing upon the question now before the Court.

The only Courts provided for under the Constitution of the State of South Carolina are, first, a Court for the trial of impeachments; second, a Supreme Court; third, a Court of Common Pleas and General Sessions; fourth, a Probate Court; fifth, Courts of Magistrates, and sixth, such other inferior courts as the General Assembly may from time to time in their wisdom establish.

A Commission cannot be held to be within the terms of this Constitutional provision, in that it is not in any respect "an inferior Court." It has no power to enter judgment or issue execution. There are no pleadings provided for it, no procedure adopted; provision is not made for appearance of parties before it in the way in which they are ordinarily to appear in Court, and a careful examination of the entire Statute fails to disclose that the Legislature contemplated the creation of any kind of a Court.

In Section 7 of the Statute (see folio 127) it is directed that the Commission shall submit to the Governor at the earliest date practicable a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary and as soon as the affairs are liquidated, a report in full of their actings and doings.

It would be inconceivable to suppose that the Legislature intended to create a Court which was to report to the Executive head of the State. The Executive and Judicial functions and departments are forever to be separate and

such provision would violate the spirit of our Institutions.

The Commissioners, as we have seen, are to give each a bond for ten thousand dollars. What a strange departure in our Legislature, to require a Judicial Officer to give bond. Each of the Commissioners is to have the power of all of them. This shows clearly the intention that they shall act simply in a ministerial and not in a judicial way.

Referring again to the Constitutional provision to which we have heretofore referred we find that in this last cited case, the Constitution of Kansas, Article 3, par. 1, authorized the Legislature to create courts inferior to the Supreme Court and by implication to define their jurisdiction, and it was held that this did not confer the power to create courts for the exercise of legislative or administrative functions.

In *Chicago, Milwaukee, etc. R. R. against Minnesota*, 104 U. S., 418, the question arose whether a warehouse and railroad commission constituted a court.

The usual powers given to such organization were conferred by an act creating it, and it was held that the act was in conflict with the Constitution of the United States as depriving a company objecting to the rates fixed by the Commission of its property without due process of law, and deprived of the equal protection of the law. It appears that the Supreme Court of Minnesota had held that there was no power in the Courts to stay the hands of the commission if it chose to establish rates which are equal and unreasonable, and in considering this question the Supreme Court of the United States, speaking by Mr. Justice Blatchford, says: (Pages 456-457.)

> "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in contro-

versy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

Mr. Justice Miller concurs in the result in this case by a series of propositions which clearly indicate his view that if such commissions should be held to be courts having the right under the Statutes creating them finally to dispose of a matter in litigation, the result would be practically to destroy the value of property employed in the carrying on of business, and to give rise to other evils not to be permitted under our system.

We think this disposes of the view presented in the exceptions and raised in the pleadings that this "Winding-up Commission" constitutes a Court whose proceedings cannot be enjoined within the provisions of Section 720 of the Revised Statutes.

Nor can it be said that the fact that the Commission was given the powers given by former legislation to the Investigating Committee, made it a Court, whose powers, however broad, were only the powers of a Legislative Committee, engaged in the investigation of a matter upon which the Legislature wished to be informed.

The provisions giving that Commission power to stop the payment of claims against the Dispensary were clearly intended simply to hold matters *in statu quo* pending that investigation, and so with all the other provisions of the Act creating and giving power to the Investigating Committee, they have no reference to the ascertainment of this last fact. What are the just liabilities of the State Dispensary, so that they may be paid out of the assigned estate of that institution.

They are to "sell property and to pay debts"—to pay all "liabilities" or "all just liabilities"—it matters not which. "of the State Dispensary."

In other words they are to take the assets as they find them and as agents or trustees, sell and realize upon them

and as such agents or trustees pay out the proceeds of their collections, returning to the State the surplus, if any.

In the *Southern Pacific against the Board of Railroad Commissioners,* 78 Fed., 236, the question arose as to whether certain Boards of Commissioners for railroad and other corporations created under the Constitution and laws of Califonia constituted a Court. They were named there also "A Commission." Now these Commissioners were given very large powers. *Inter alia,* they were to establish rates of charge for transportation of passengers and freight by railroad and other transportation companies, and they could enforce their decisions and correct abuses through the Court, and it was held (Judge McKenva) that this Commission was not a Court.

In *Ex Parte Childs,* 12 S. C., 111, it was held that a Commissioner appointed to take proof of bonds alleged to be invalid, and to ascertain and report what bonds and what proportion of bonds were valid obligations of the State, was not a Court, but only an officer charged with certain ministerial duties. Here it was called a Court —"The Court of Claims"—and had many of the attributes and functions of a court.

It was held "The 'Court of Claims' established by the Legislature by the act approved March 22nd, 1878 (16 Stat. 555) is not a court, organized under he authority of Article IV, Section 1, of the Constitution, but a tribunal in the nature of a board of audit, created under Article XIV, Section 4, to inquire into the amount and character of the unfunded debt of the State."

In *Busch v. Webb,* 122 Fed., 655, it was held that a Commissioner's Court of a County in Texas in declaring and publishing the result of the election, "acts ministerially and is not a court in the meaning of the Revised Statutes" (Sec. 720) "whose action in such capacity may not be restrained by the Federal Court."

This question is very fully considered and the authorities cited and it was held that something more was necessary than the mere conferring of ministerial powers, even when

the exercise of such powers was to lead to a definite result in reference to the election.

Western Union Telegraph Company vs. Myatt, 98, *Fed. Rep.*, 331. The question arose in this case as to whether the Court of Visitation of Kansas created by an Act of Legislature and given thereby and by the general laws of the State general powers to regulate the business of railroad and telegraph lines within the State, and among others the power to classify freight, to require the maintenance and construction of depots, regulate crossings and intersections of railroads and the operation of trains, with various other powers and duties, therein mentioned, is in the exercise of such power a legislative, administrative body, or whether it was a court. It was held that it was the former, though it was denominated "a Court," and provided with the machinery of one, and it was held that even the power to conduct an investigation in the form of legal proceedings, before taking action in the matters committed to it, did not constitute it a court.

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simply to hold matters *in statu quo* pending that investigation, and so with all the other provisions of the Act creating and giving power to the Investigating Committee, they have no reference to the ascertainment of this last fact. What are the just liabilities of the State Dispensary, so that they may be paid out of the assigned estate of that Institution.

It is thus submitted upon the whole case that the views expressed by the Circuit Court of Appeals are sound upon principle and fully supported by decided cases, and should this Court direct the record to be certified for examination and correction of the Decree, there shall be found no error requiring its interposition.

We have discussed at length all the questions arising upon the merits of this controversy, and the record is before the Court.

We therefore submit to the Court that under the authority of *American Sugar Refinery Company* against *New Orleans*, 181 U. S., 283, the Court will now, in this proceeding, pass upon the merits, and hold that the Circuit Court of Appeals committed no error, and remand the case to that Court with direction to proceed with it according to its judgment heretofore entered.

T. MOULTRIE MORDECAI,
FRANK CARTER,
SIMEON HYDE,
H. C. CHESTER,
Attorneys for Respondents,
Wilson Distillery Co.
Wilson Distilling Co.

In the Supreme Court of the United States

October Term, 1908.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON, ET AL., PETITIONERS,

versus

WILSON DISTILLING COMPANY, ET AL and THE FLEISCHMANN COMPANY,
RESPONDENTS.

BRIEF IN OPPOSITION TO THE APPLICATION FOR A WRIT OF CERTIORARI, BY GEORGE B. LESTER AND ALFRED S. BARNARD, Counsel for Respondents, The Fleischmann Company.

This is a petition for a writ of certorari to review a decision of the Circuit Court of Appeals for the Fourth Circuit affirming an interlocutory order of the Circuit Court for the District of South Carolina, granting an injunction and appointing receivers.

The application for the writ presents two inquiries, the first involving the jurisdiction of this Court, that is the power of the

Court to issue a writ of certiorari in a case of this character, and the second the discretion of the Court, that is ought the writ to be issued, even if this Court should be of the opinion that it has the power so to do.

(1) *Has the Court the power to issue a writ of certorari in a case of this character?*

For the purpose of determining this question we deem it advisable to refer briefly to the decision of the Circuit Court of Appeals and ascertain what that Court did decide and the nature and effect of its decision. A reference to the record and the opinion rendered by the Circuit Court of Appeals, will show that the only question presented to and considered by that Court, was, whether or not the Circuit Court for the District of South Carolina erred in granting an injunction and appointing receivers, and the judgment of the Circuit Court of Appeals was that the case "be remanded to be further proceeded with in accordance with the views herein expressed." The decision of the Circuit Court of Appeals was not a final one, nor does it contain any element of finality, and it is well settled that no appeal would lie therefrom to this Court, because the act of Congress which provides for appeals from interlocutory orders granting injunctions and appointing receivers, limits the right of appeal to the Circuit Court of Appeals.

Kirwan vs. Murphy, 170 U. S., 205.

Nor can this Court by a writ of certiorari require a case to be removed to it from the Circuit Court of Appeals, unless the judgment of the Circuit Court of Appeals was a final one or the record before the Circuit Court of Appeals presented the case in such wise that the Court of Appeals might have finally decided it.

Chicago & Northwestern Railway Co. vs. Osborne 146 U. S., 354.

Taylor vs. Louisville & Nashville R. R. 172 U. S., 684.

Harriman vs. Northern Securities Co. 197 U. S., 244.

And especially is this true where the nature of the case is such that an appeal will lie direct to this Court from a final decree of the Circuit Court.

Re Tampa Surburban R. R. Co. 168 U. S., 583.

The fact that the Circuit Court of Appeals may have committed error in affirming the interlocutory order of the Circuit Court is no reason for granting a writ of certiorari where the petitioner has another remedy or may bring the case to this Court from a final decree of the Circuit Court.

In Fields vs. United States 205 U. S., 292, Mr. Justice Brewer says: "A certiorari can be issued only when a writ of error cannot," and certainly this language would apply with equal force to an appeal. In other words, a writ of certiorari cannot be issued when an appeal will lie.

The petitioners have attacked the jurisdiction of the Circuit Court upon the ground that the suit is one against the State of South Carolina and within the inhibition of the Eleventh Amendment to the Constitution of the United States. The case, therefore, involves an application of this amendment and is within that class of cases which may be, by the judiciary act of March 3d, 1901, brought directly to this Court by an appeal.

Loeb vs. Columbia Township 179 U. S., 472.
American Sugar Refining Co. vs. New Orleans 181 U. S, 277.

It may be contended that the principle requiring a final decree in the Circuit Court of Appeals before a certiorari will issue from the Supreme Court, has been modified by the case of Forsythe vs. Hammond 166 U. S., 514, but a careful reading of the opinion in that case, taken in connection with the decision in the Harriman case *supra*, will show that the real reason for granting the writs in those cases was the fact that the Court of Appeals had the entire controversy before it in such way that it could have and ought to have rendered a final judgment. In fact, the decision was in effect final, although the cases were

remanded to the Circuit Court for further proceedings, the only proceeding being to render a judgment in accordance with the decision of the Circuit Court of Appeals. In the Harriman case Chief Justice Fuller uses this language: "In applying to this Court for the writ of certirorai, counsel for complainants insisted that the Circuit Court of Appeals had practically disposed of the entire controversy on the merits, although the decree only reversed the order of the Circuit Court granting the preliminary injunction. We accepted that view and granted the writ in the circumstances notwithstanding the decree was not final. In our opinion the record presented the whole case to that Court in such wise that it might properly have been finally disposed of in terms by its decree in accordance with the well settled rule upon that subject."

The clear inference from this language is that unless the Circuit Court of Appeals has rendered a final judgment or the record before the Circuit Court of Appeals presented the case in such a way that it might have been finally decided, or the judgment rendered by the Court of Appeals, practically disposed of the whole controversy, a writ of certorari cannot and will not be allowed.

(2) *Should this Court grant the writ?*

The principal and practically the sole ground upon which the petitioners insist upon the exercise of this discretionary power of this Court, is the conflict of decision between the U. S. Circuit Court affirmed by the Circuit Court of Appeals and the Supreme Court of South Carolina, but an examination of the record will show that this conflict, if any exists, was brought about by the petitioners themselves, or at least in a suit to which they were friendly, although they appeared in the record as adverse parties. No one can read the record in the case decided by the Supreme Court of South Carolina without at once reaching the conclusion that the suit instituted there was collusive, its chief purpose being to get a decision of that Court, which the petitioners thought would be binding upon the U. S. Circuit Court for the District of South Carolina. Again it will be seen that the case before the Supreme Court

of South Carolina involved only $15,000 of approximately $800,000 then in the hands of the petitioners, and that $15,000 having been paid there is no longer any danger or probability of a conflict between the two Courts, should the order of the Circuit Court directing the money to be turned over to the receivers appointed by it, be put into effect. The conflict between the decisions of the Court of Appeals and the Supreme Court of South Carolina is in no sense "fraught with disastrous results to the commissioners and the banks," nor will that conflict result in any inconvenience or embarrassment in the future conduct of the cause in the Circuit Court. There is therefore, no reason for the interposition of this Court to review the decision of the Circuit Court of Appeals on appeal from the interlocutory order, for it is well settled that this Court will not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

Suppose the petitioners should, as required by the order of the Circuit Court, pay the fund in their hands to the receivers, it would only be for the purpose of preserving the fund until a final determination of the controversy. If on an appeal from the final decree of the Circuit Court this Court should be of opinion that the Circuit Court had no jurisdiction it would at once direct that the fund in the hands of the receivers be paid back to the commissioners (petitioners) and this would, of course, relieve them from any possible liability to the State of South Carolina. Even in those cases where this Court has held that it had the power to issue a writ of certiorari, it has reiterated the doctrine "that it is a power which will be sparingly exercised and that it is solely questions of gravity and importance that the Circuit Courts of Appeals should certify to us for instructions, and that it is only when such questions are involved that the power of this Court to require a case in which the judgment and decree of the Circuit Court of Appeals is made final to be certified, can be properly invoked."

And this Court has uniformly declined to issue writs of certiorari in cases where, there being only a matter of private in-

terest, no final judgment had been rendered in the Court of Appeals.

Chicago & Northwestern R. R. Co. vs. Osborne 146 U. S., 354.

The question involved in this litigation may be of great interest to the parties, but it is of private concern only and not one of public importance, nor is there any reason why this Court should take control of the litigation in order to avoid a conflict of jurisdiction, especially when the jurisdiction of the Circuit Court first attached, and the case was brought in the State Court plainly for the purpose of provoking such a conflict.

Respondents respectfully insist, therefore, that no final decree having been rendered in the Circuit Court of Appeals and the record not having presented the case in such a way that it might have been finally disposed of on the merits, and the case being one in which the petitioners have a right of appeal from the final decree of the Circuit Court, this Court has no power to issue the writ asked for.

And further, that the question involved being one of private interest only and not one of gravity or public importance, and there being no conflict of decision which is likely to bring about any inconvenience or embarrassment in the future conduct of the cause, there is no necessity for this Court to intervene in the litigation at this stage, and the writ ought not to issue, even though the Court should be of the opinion that the power to issue it does exist.

ON THE MERITS.

The petitioners filed in the Circuit Court of Appeals six assignments of error, which assignments really presented but three questions, and in their brief on this motion they have confined their discussion to three points. In order to deal with the questions intelligently we think a clear understanding of the nature of the case is essential, and to this end we present the following:

Statement of Facts.

It appears from the record in the Circuit Court of Appeals, that, in 1892, the State of South Carolina established an institution which became known as the State Dispensary; that by the provisions of the act creating such institution, all persons within the State of South Carolina were forbidden and prohibited from manufacturing, selling or distributing, or from keeping or offering for sale within the State any spirituous, malt, vinous, fermented or other intoxicating liquors; that the business was carried on under the direction of a board known as the Board of Directors of the State Dispensary, whose duty it was to purchase all alcoholic liquors for lawful use within the State, and to sell the same to the various county dispensaries, as provided in said act. The law further provided that all money arising from the sale of liquors by the Board of Directors of the State Dispensary should be deposited with the State Treasurer, and should be held by him as a special fund, separate and distinct from the general funds of the State and kept to the credit of the Board of Directors of the State Dispensary; that all liquors purchased by said Board of Directors of the State Dispensary should be paid for out of these funds by a warrant to be issued by the State Dispensary Commissioner, at the direction of the said Board of Directors of the said State Dispensary, and no part of this special fund could be lawfully paid out by the State Treasurer except upon warrants so issued. That this fund was to be applied, first to the payment of the expenses incurred in the conduct of the business, the net profits realized being the only part of the funds subject to appropriation; that while this law was in force and the State Dispensary was still engaged in business, the complainants (appellees) sold and delivered to it at prices which were entirely reasonable and mutually satisfactory, a large quantity of valuable whiskies and other spirituous liquors, all of which whiskies and liquors were received and accepted by the said Board of Directors of the State Dispensary, and the greater part of them had been at the time of the passage of the act of 1907, hereinafter referred to, sold at a substantial profit, a part of the money arising from such sale being at that time in the

hands of the State Treasurer to the credit of the said Board of Directors of the State Dispensary. That the General Assembly of the State of South Carolina at its session held in the year 1907, passed an act abolishing the State Dispensary, and at the same session passed another act, which was approved on the same day, to-wit, the 16th day of February, 1907, providing for the disposition of all property connected with the State Dispensary and for winding up its affairs. By the terms of this last act, the Governor of the State was authorized and directed to appoint a commission consisting of five business men, whose duty it should be to close out the entire business and property of the State Dispensary by disposing of all goods and property connected therewith, by collecting all debts due to it, *and by paying from the proceeds thereof all just liabilities at the earliest date practicable.* Said act also provided that said Commission should be at liberty to make such disposition upon such terms, times and conditions as their judgment might dictate, and also allowed said Commission to return to the persons, firms or corporations from whom purchased, all liquors which had been illegally bought by the managing agents of the State Dispensary, and for the purpose of determining what liquors, if any, had been illegally bought, the commission was authorized to make investigations as provided in said act. That, within a short time after the passage and approval of the act of 1907,, the defendants (appellants) were appointed commissioners, and said defendants having duly qualified and organized, pursuant to said act, became, and at the time of the institution of this suit were, and do now constitute the State Dispensary Commission. That immediately upon their qualification as commissioners and organization as the State Dispensary Commission, the defendants entered upon the discharge of their duties, and, in accordance with the act providing for their appointment, took possession and control of the entire business and property of the State Dispensary; that at the time said defendants took control, there was in the hands of the State treasurer, to the credit of the State Dispensary, a large sum of money, amounting to about $150,000, and this money was thereupon turned over to the defendants and placed to their credit in bank, along with the money realized from the

sale of the property of the State Dispensary and the collection of debts due to it. That at the time the defendants took possession of the property, there was on hand at the warehouse in Columbia, a large quantity of whiskies and other spirituous liquors which had been bought from various individuals, firms and corporations. That there was on hand a large quantity of whiskies and other spirituous liquors which had been purchased from the Fleischmann Company; that the Commissioners thereupon requested the Fleischmann Company to take back such goods as had been purchased from it and had not been disposed of by the State Dispensary, and held out to the Fleischmann Company as an inducement for so doing that it would enable the Commission to more rapidly dispose of the goods on hand, and would greatly facilitate a settlement of the affairs of the State Dispensary and enable the Commission to make a much earlier payment of its liabilities. That the Fleischmann Company did take back all of its goods on hand and gave credit therefor at the invoice prices thereof. That thereafter the Fleischmann Company furnished to the Commission at its request an intemized statement of the account held by it against the State Dispensary and the said Commission notified said Company that there was a discrepancy between the amount claimed by it and the amount shown to be due by the books of the Dispensary of $292.14, and claimed that the State Dispensary was entitled to a credit of that amount, at the same time stating that the account furnished by the Fleischmann Company had been audited and that it corresponded substantially with the account kept by the State Dispensary, and that there was a balance due in accordance with said audit and the books of said State Dispensary of $66,501.19; that said credit was duly allowed and the Fleischmann Company then insisted that the balance due to it should be paid, but notwithstanding the defendants had realized from the sale of the property of the State Dispensary and from the collection of debts due to it and had to their credit in bank, together with the sum which had been received by the State Treasurer, about $800,000, a sufficient sum to pay all of the liabilities, the Commission declined and refused to make any payment. Thereafter, on the 23d day of January, 1908, the

Fleischmann Company filed its bill (record, page 17), on which a notice to show cause was issued returnable before the Circuit Judge at Asheville on the 29th day of January (record, page 29), and on the next day, upon an affidavit to the effect that the Commission had threatened to turn over the money in their hands to the State Treasurer, a restraining order was issued enjoining the defendants, as hereinbefore stated (record, p. 23). On the return day of this notice, a return was filed, in which it was admitted that the books of the State Dispensary had been audited, and the entries thereon had been brought into substantial agreement with the items of the Fleischmann Company's account.

On the hearing the case was fully argued, and on the 29th day of February, the Circuit Court handed down its decision and entered an order directing that an injunction *pendente lite* should issue, in accordance with the prayer of the bill (record, page 86), the opinion of the Court upon the questions involved being filed on the 5th day of March, 1908 (record, p. 88).

On the 19th day of February, 1908, the Wilson Distilling Company and others, who had theretofore brought suit against the Dispensary Commission filed an amended and supplemental bill (record, p. 105), on which a notice to show cause was issued, returnable on the 29th day of February, 1908 (record, page 122), and, on motion, the hearing on this order was postponed until the 7th day of March, 1908 (record, p. 143). It having been made to appear to the Court, on the 6th day of March, that there was danger of the fund in the hands of the Commission being diverted, an order was entered appointing temporary receivers (p. 189), and at the hearing on the next day, the two causes of Wilson Distilling Company and The Fleischmann Company were consolidated, and upon the evidence in both causes the Court ordered that an injunction *pendente lite* should issue and appointed permanent receivers to take charge of and administer the fund in the hands of the Commission. From this order an appeal was taken to the Circuit Court of Appeals.

It appears further from the record that after the Circuit Court had announced its decision, taking jurisdiction of the

case, and issuing an injunction *pendente lite*, a proceeding was instituted on behalf of the attorney general of the State of South Carolina in the Supreme Court of that State to compel the Commissioners to pay to the petitioner a part of the money in their hands (record, p. 232). Upon this petition and the return thereto an opinion was handed down by the Supreme Court of South Carolina, construing the act of February 16th, 1907, and, thereupon, a motion was made before the Circuit Judge to vacate his orders continuing the injunction and appointing the receivers. This motion was heard on the 27th day of March and denied. But the Circuit Court, treating the motion as an application to have the amount paid, made an order directing its payment and payment was made (record, pp. 298 to 301).

ARGUMENT.

All three contentions of the petitioners are so closely related that they may be discussed together, for if the suits are suits against the State of South Carolina or the State is on indispensable party the some result will follow. In either event the Circuit Court of the United States was without jurisdiction and any consideration of these questions involves the third and makes it necessary to determine the exact position of the petitioners and the status of the fund in their hands, under the provisions of the Act of 1907.

It will be observed that by that act it became the duty of the State Dispensary Commission to close out the entire business and property of the State Dispensary, excepting real estate, by disposing of all goods and property connected therewith, by collecting all debts due, and *by paying from the proceeds all just liabilities at the earliest date practicable*. And it was left to the Commission to decide when, upon what terms and conditions the property should be disposed of, and the only matter concerning which they were authorized to make investigations was with reference to liquors then on hand, the sole purpose of such investigation being to ascertain whether or not those liquors had been illegally bought, and if so illegally bought, return the same to the persons, firms or corporations from whom

they had been purchased. When, therefore, the Commission induced the creditors, and particularly the Fleischmann Company, to take back all of the goods remaining on hand which had been purchased from that company, it had no further power under the act except to audit that company's claim and pay the same if it was found to be correct. As to the payment for those goods which had been purchased by the State Dispensary and disposed of, the Commission had no discretion. The State Dispensary had accepted the property, it had been sold at a substantial profit and the act recognized the amount due as a just liability. The only question which could have been possibly contemplated as open for investigation, was the validity of the purchase of the goods remaining on hand at the time the Commission took charge. The Commission returned the goods which they desired to return, converted the remainder into cash, collected the debts, and the fund derived from such sales and collections clearly became a trust fund for the benefit of those creditors who held just liabilities against the State Dispensary. The members of the Commission were merely trustees, whose duty it was under the act to apply the money in their hands to the payment of these debts. A dispute having arisen then between any creditor and the members of the Commission as to the amount justly due, there was but one way by which a settlement could be reached, and that was to adjudicate the question in some Court.

If we eliminate, then, all the foreign matter which has been dumped into the case, get rid of the political features of it and shut out the hue and cry about States' Rights, it will be seen that it is a plain, everyday suit in equity brought by a *cestui que* trust to compel a trustee, holding property for his benefit, to perform the duties imposed upon him by the instrument creating the trust. A suit brought merely for the purpose of settling a dispute between a *cestui que* trust and a trustee as to the amount legally due to the *cestui que* trust out of a fund in the hands of the trustee. The only novel feature in this case, and that is more apparent than real, is that the trust was created by a State. But this is not new, for it has been fre-

quently held that a State, or sovereign, can create a trust and that a trust so created is enforceable in a Court of Equity.

Perry on Trusts, Sec. 30.
Bd. of Liq. v. McComb, 92 U. S., 541.
Chaffraix vs. Bd. of Liq., 11 Fed., 638.
Swasey vs. N. C. R. R. Co., 23 Fed., Cases 518 (case No. 13,679).

The same principle is clearly recognized in *Louisiana vs. Jumel*, 107 *U. S.*, * * * and also in *Vose vs. Int. Imp. Fund*, 28 *Fed. Cases*, 1286, and *Ford vs. Delta & Pine Land Co.*, 164 *U. S.*, 662.

As was said by this Court in *McKee vs. Lamon*, 159 *U. S.*, 317,

"There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter which may be enforced by a bill in equity, if not by an action at law. The acceptance of money, with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor."

See also:

Bearings vs. Dabney, 19 Wall, 1;
Clews vs. Jamieson, 182 U. S., 461 (479-480).

It is clear from the provisions of the act of 1907 that the money in the hands of the Commission is a trust fund out of which the creditors holding just liabilities against the State Dispensary are entitled to have their debts paid, and a suit brought by a creditor, or by several creditors for the purpose of determining the amount of the liability and of compelling the Commission to pay the same is not a suit against the State, nor is it one in which the State has an inseparable interest. The title to the property is in the Commission and they have the possession. The State's interest, if it has any, is represented by the Commission and a Court of Equity can render a decree which will fully determine the rights of all the parties

For the purpose of doing this, it is not necessary that the State should be before the Court, and inasmuch as the State cannot be made a party without depriving the Court of its jurisdiction, it is well settled that the State need not be brought in.

It cannot with reason be contended that the Commissioners are even officers of the State in the sense in which that term has been used in connection with suits brought against State officers. No discretion is vested in them as to the payment of a just liability, whenever a liability has been determined to be just, and if a dispute arises as to the justness of any claim, this dispute can only be settled in a regularly constituted Court of justice. This is not, then, in any aspect of it, a suit against the officers of the State to compel the officer to perform something which the State has said that he should not do, but rather to require him to do that which the State has directed him to do. As stated above, it is a suit brought to enforce a trust, a dispute having arisen between the trustees and certain of the *cestuis que* trust as to the amounts justly due. The mere fact that the State created the trust does not make the State an indispensable party.

McKee vs. Lamon, *supra*.

But, if it should be admitted that the members of the Dispensary Commission are officers of the State of South Carolina, they certainly are officers appointed solely for the purpose of carrying out the provisions of the act of 1907, and they hold the money which has come into their hands applicable to the purposes designated in that act. It may be regarded as well settled that where officers are appointed solely for the purpose of carrying out specific duties, they are not general officers of the State in such sense that a suit against them is a suit against the State within the inhibition of the 11th Amendment.

W. U. Tel. Co. vs. Myatt, 98 Fed., 335.

It is clear from the foregoing authorities that this is not a suit against the State, and the question arises, is the State an indispensable party?

A careful reading of the act will show that the State has reserved neither title nor interest to the fund in the hands of the Commission. Section 5 of the act merely directs that the Commission shall pay to the State treasury any surplus which may remain in their hands after the payment of all expenses incident to the administration of the trust, *and after discharging all liabilities.*

It will be noted that the State is not claiming any interest in this fund, nor does it by the act of 1907 claim any interest in the fund until all of the just liabilities of the State Dispensary have been paid and the expenses incident to the carrying out of the act deducted. The only suggestion of the interest of the State comes from the appellants themselves, who in their return contend that they hold the money as the property of the State, but it is well settled that if the State is not necessarily a defendant, the Courts of the United States are bound to exercise jurisdiction, even though some interest of the State may be affected by the decision.

U. S. vs. Peters, 5 Cranch. 136;
Louisville, &c., R. R. Co., vs. Leston, 2 How., 551.

And, certainly it can never be alleged that a mere suggestion of title in the State to property in possession of an individual must arrest the proceedings of the Courts and prevent their looking into the suggestion and examining the validity of the title.

Tindell vs. Wesley, 167 U. S., 220.

The case at bar is clearly distinguishable from Cunningham vs. Macon, &c., R. Co., 109 U. S., 455, and Christian vs. Atlantic &c., R. R., 133 U. S., 233 because each of these cases there was an effort to reach by foreclosure, property, the title to and possession of which were both in the State, and of course, before the Court could transfer the title it was necessary to have the legal owner and holder before the Court; but here the State has neither the title to, nor the possession of, the fund out of which the complainants are seeking to have their debts paid, and in order to enforce the provisions of the act of 1907

and to carry out the trust therein established the State is not a necessary or indispensable party.

McKee vs. Lamon, 159 U. S., 322;
Bd. of Liq. vs. McComb, 92 U. S., 531.

The test of indispensable parties is, as was said in Horne vs. Lockhart, 17 Wall., 579, whether their interests are so interwoven and bound up that no decree could be made without necessarily affecting them, and it is only the presence of parties thus situated which is essential to the jurisdiction of the Court. The question always is, or should be, whether to a decree authorized by the case presented, the party who is not before the court is an indispensable party, for, if the interests are severable and a decree without prejudice to that party's rights can be made, the jurisdiction of the court should be retained.

It is plain from the provisions of the act itself that the State of South Carolina intended that the question as to whether or not a claim presented to the Commission was a just liability of the State Dispensary, should be settled by the Commission, and that if it was necessary to litigate the question, the litigation should be between the claimant and the Commission. The State has provided that the just liabilities of the State Dispensary should be paid, and certainly it cannot be presumed that the Court will not fully protect the interests of the State in deciding what is a just liability. If the liability is just it should be paid and the interest of the State is not affected by a decree directing such payment. In other words, this is clearly a case where a Court of equity can render a decree upon the case presented and can adequately and fully determine all the issues between the parties without doing violence to any right of the State and without prejudice to any interest which the State may have. This being so, the State is not an indispensable party to this litigation.

Horne vs. Lockhart, *supra.*

The petitioners devote much of their brief to the argument that the State of South Carolina had the right to establish the

State Dispensary; that the dispensary was a State institution and therefore the debts contracted in its management created the relation of debtor and creditor between the persons selling to the State Dispensary and the State of South Carolina. They then argue that the relation of debtor and creditor having been created, it was not changed by the act of 1907, and they reason from this that the effect of that act was not to create a trust fund for the benefit of complainants and others holding just liabilities against the State Dispensary, and that a suit brought by the creditors is necessarily a suit against the State, the debtor. We think even though it be conceded that the State of South Carolina did have the right to go into the liquor business; that the relation of creditor and debtor did exist between the State of South Carolina and the various persons who sold goods to the State Dispensary, it does not at all follow that when the debtor, the State of South Carolina, by the act of 1907, transferred all of the dispensary property to the petitioners, with directions that it be disposed of and applied to the payment of the just liabilities, that act did not create a trust in favor of those creditors holding just liabilities, which trust the creditors might enforce. And when the creditors accepted the trust and elected to collect their debts out of the fund in the hands of the Commission, the result was a contract between the State and the creditors, which could not constitutionally be impaired.

See Ford vs. Delta & Pine Land Co., 164 U. S., 662.

The petitioners further contend that this Court is bound by or at least ought to follow the decision of the Supreme Court of South Carolina in its construction of the act of 1907. It should be borne in mind that at the time the bills were filed, there had been no decision of the Supreme Court of South Carolina construing or attempting to construe the act of 1907. That it was only after the jurisdiction of the Circuit Court of the United States had attached and that Court had been called upon to adjudicate the rights of the parties under that act, that the decision of the Supreme Court of South Carolina was rendered. We take it that it is no longer an open question in the

Courts of the United States, that those Courts not only do, but are bound to exercise their independent judgment in cases brought for the purpose of establishing rights under the statutes or constitution of a State, where the State Court has not at the time construed the statute or the constitution. This was so decided in

Pease vs. Peck, 18 How., 595;
Burgess vs. Seligman, 107 U. S., 20 (33);
Carroll vs. Smith, 101 U. S., 556,

all of which are cited with approval in a very exhaustive opinion on this question delivered by Mr. Justice Harlan in Great So. Hotel Co. vs. Jones, 193 U. S., 533.

We think that the foregoing authorities establish beyond question that the fund in the hands of the Dispensary Commission out of which the complainants are seeking to have their debts paid is a trust fund, that this suit is not a suit against the State, but is a suit between the complainants and the members of the Dispensary Commission as trustees for the purpose of having the trust established by the said act declared and administered. That the State is not a necessary or indispensable party to the litigation and that if the members of the Commission are regarded as officers of the State, the purpose of this suit is not to require them to do what a statute of the State forbids their doing, but to compel them to do that which the statute says they shall do, as was the case in Rolston vs. Crittenden, 120 U. S. That they are vested with no discretion in the matter because as soon as a liability is established to be just it is their plain official duty to pay the same. That this is not, therefore, a suit against the State, and is clearly distinguishable from the case of Louisiana vs. Jumel, 107 U. S., 711. The principle upon which this suit is based being fully sustained by

Osborne vs. Bank, 9 Wheat., 738;
Bd. of Liq. vs. McComb, 92 U. S., 531;
Pennoyer vs. McConnaughy, 140 U. S., 1;
Tindell vs. Wesley, 167 U. S., 220.

There has been much discusison in this case of the very interesting question as to how far the Eleventh Amendment protects a state against a suit to enforce the payment of a debt contracted outside of its sovereignty. A decision of this question is not essential because the suits of complainants are fully sustained by the ordinary principles of equity applicable to the administration of trusts. But if we must construe the Constitution in the light in which it presented itself to the framers, it may well be doubted if the Eleventh Amendment affords any protection against such a debt. The purpose of the Amendment was to protect the state in the exercise of those functions which pertain to its sovereignty and while a state may have the power to engage in business in competition with its citizens, it is inconceivable that the framers of the Eleventh Amendment ever contemplated that a state might engage in business, contract debts in the purchase of property used to carry on the business, sell the property, so purchased, at a large profit, put the money, realized from the sales, into its treasury and when called upon to pay plead the Eleventh Amendment and say to the creditors whose property it has taken, you can not enforce your just claims by suit and therefore you must accept such part of your debt as the State is inclined to pay or get nothing. This would indeed change the Amendment from a shield to a sword. That it was not so intended and that the State is amenable to the law whenever it engages in business outside of its sovereignty, is clearly established by this court in a decision to which this very state was a party and this very business and institution was involved.

South Carolina vs. United States, 199 U. S., 437.

The respondents respectfully submit that the Circuit Judge committed no error in taking jurisdiction of these suits and in continuing the injunctions to the hearing and appointing receivers to preserve the fund; that the decision of the Circuit Court of Appeals, concurred in by the learned Chief Justice of this Court, who presided in the Circuit Court of Appeals when these cases were argued, affirming the interlocutory orders of the Circuit Court, was so clearly correct, this Court could do

nothing more than approve the decision of the Circuit Court of Appeals, even if the cases were reviewed by certorari, and under such circumstances the petition should not be granted.

Respectfully submitted,

GEORGE B. LESTER,
ALFRED S. BARNARD,
Counsel for Respondent, The Fleischmann Co.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 625.

October Term, 1908.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON, et al., *Petitioners.*

Versus

WILSON DISTILLING CO. et al., and THE FLEISHMANN CO., *Respondents.*

Argument of Clifford L. Anderson, Thomas B. Felder and Daniel W. Rountree, for Petitioners.

ARGUMENT FOR PETITIONERS.

In addition and supplemental to the briefs which have been filed in behalf of the Petitioners in the above stated cause, we desire to submit to the Court the following argument, in support of the contentions of the Petitioners in certiorari.

The questions which we desire here to discuss may be briefly stated as follows:

1.

Did the Act of the General Assembly, approved Feb-

ruary 16, 1907, providing for the appointment of a Commission to wind up the affairs of the South Carolina State Dispensary, create a trust in favor of the creditors, whose claims arose out of the operations of the South Carolina State Dispensary, capable of enforcement in a Court of Equity?

2.

Were the suits brought by the Wilson Distilling Company, et al, and The Fleishmann Company against the Dispensary Commission in effect suits against the State of South Carolina, or if not technically so, was the State of South Carolina an indispensable party, so as to render the Circuit Court of the United States for the District of South Carolina, without jurisdiction of the cases, by reason of the inhibition contained in the Eleventh Amendment of the Constitution of the United States?

3.

Ought the decision of the Supreme Court of the State of South Carolina construing the statute above referred to of 1907, and the amendment thereto passed in February, 1908, to control the Federal Court in determining the scope and meaning of those statutes, so far as that decision determines questions one and two?

4.

Did the case made by the bills filed, answers made to the return and evidence submitted, justify the Circuit Court of the United States for the District of South Carolina, sitting as a Court of Equity, in granting the relief prayed for, and in passing the orders granting an injunction against the Dispensary Commission, and appointing Receivers for the funds in its hands?

FIRST QUESTION.

In discussing this question it will be profitable, we think, to briefly consider the history of the legislation in the State of South Carolina, relating to its Dispensary.

In 1892, the General Assembly of that State, by enactment, forbade any person from manufacturing or dealing in intoxicating liquors of every character, within the State of South Carolina, and provided that the State alone should have the right to sell such intoxicating liquors within its borders. In pursuance of this plan of dealing with the liquor question, it created a State Dispensary, providing the machinery necessary for conducting the liquor business in the State, through officers of the State. These officers were authorized under the law to buy supplies of liquors of every kind and character from persons dealing in these commodities, and to sell such liquors under the limitations and restrictions contained in the enactment. The credit of the State alone was pledged to the payment of the liabilities which might be incurred by the officers conducting the State Dispensary, and debts which might be created by these officers in the purchase of liquors were the debts of the State, collectable just as other debts against the State might be collectable.

No provision was made for the enforcement of debts of this character against the State, or against the Dispensary, or against the officers in charge of the Dispensary, and all persons who dealt with the State in selling liquors to it, for use in its Dispensary, depended upon the good faith of the State alone for the payment of any obligations which might become due to them, and arising out of such sales.

The Constitution of South Carolina of 1895, expressly

provided for this control of the liquor business in the State, and the General Assembly of the State shortly after enacted a new Dispensary law, changing the former law in some minor particulars, but keeping in force the main scheme, originally contemplated and provided for.

On the 16th day of February, 1907, the General Assembly of the State of South Carolina abolished the State Dispensary system, and repealed all laws relating thereto.

It is perfectly clear that had matters been allowed to rest here, persons who had sold liquors to the State for use in its Dispensary, and to whom balances were still due on account of such sales, were relegated as a sole remedy for the collection of their claims, to such disposition thereof as might be made by the State acting through its Legislative body. No such creditor would have had the right to sue upon his claim in any Court, nor could that right ever accrue to him until the State of South Carolina by enactment of its General Assembly, had consented to the bringing of such a suit; for the Constitution of that State expressly provides: "The General Assembly may direct by law in what manner claims against the State may be established and adjusted." And the Eleventh Amendment of the Constitution of the United States of America, prohibits the bringing by any citizen of a suit of any kind whatsoever, against a sovereign State of the United States, without that State's consent, and that consent can be expressed only through the legislative branch of its government.

But on the 16th day of February, 1907, the General Assembly of the State of South Carolina also passed an Act which was entitled

"An Act to provide for the disposition of all property

connected with the State Dispensary, and to wind up its affairs",

and it is contended by the creditors who brought the suits in the Circuit Court of the United States for the District of South Carolina, upon which the interlocutory decrees were entered, which are here sought to be reviewed, that this Act of the General Assembly of South Carolina, created a trust in favor of the creditors of the State, whose claims arose out of the operations of the State Dispensary, whereby and whereunder they became directly interested in the funds which came into the hands of the Commission, provided for in this Act, in the enforcement of which the aid of the Court can be invoked.

In order to determine the correctness of this contention, let us analyze the Act in question. What was its purpose? Did the Legislature intend by this Act primarily to provide a method of paying the claims against the State, growing out of the State Dispensary operations, or was the payment of such liabilities a mere incident to the main scheme of the enactment?

The title of the Act declares its purpose to be "to provide for the disposition of all properties connected with the State Dispensary, and to wind up its affairs."

The State owned a large amount of assets connected with its Dispensary. These assets consisted of liquors and other personal property, and of debts due to the State by various persons, and subdivisions of the Government, arising in the course of the operation of the business of the Dispensary. It was highly important that these assets should be reduced to money. It was absolutely necessary that some machinery be provided to accomplish this purpose, and that capable, upright persons should be placed in charge, in order that the assets

should be made to realize the largest amount, and generally that the interests of the State might be wisely and honestly protected. The assets in question were the property of the State, and the money which might be realized therefrom continued to be the property of the State.

The Commissioners provided to be named in said enactment were the agents and representatives of the State, exercising delegated and limited authority, and acting entirely in behalf of the State of South Carolina. The duties of this Commission, broadly stated, were to wind up and investigate the affairs of the Dispensary Commission. The selling of the property connected with the Dispensary, and the paying of the liabilities arising out of the Dispensary were mere incidents to the general purpose; necessary to be done, of course, to carry out the main scheme, but in no sense was the payment of the liabilities the primary end which the General Assembly had in view in passing the Act, and in providing for the creation of the Commission. As to whether or not the Commission itself has the power to determine that a debt is just or unjust, is a matter of no importance. If the Legislature by this enactment did not confer this power upon the Commission, it did not part with the right to determine this question at all, but the exclusive right of the General Assembly to determine whether an obligation of the State is just or unjust still rested in that Body, and if a dispute arose between the Commission and alleged creditor of the State, as to the justness or unjustness of the creditor's claim, the creditor's sole right under this enactment of the General Assembly of South Carolina is to apply to the Legislature for relief. (1)

The learned Circuit Court of Appeals holds that this

(1) R. R. Co. vs. Hecht
95 U. S. 170.

Act of the General Assembly of South Carolina did create a trust for the benefit of creditors, and says:

> "The provisions of the Act creating the Dispensary Commission are strikingly similar in substance to the usual form of conveyances of property in trust, for the benefit of creditors. There are the necessary three parties: The Trustor, the Trustee, and the Cestui que trust. The State acting through the Legislature, passes the title and possession of certain property to the five appellants, who are constituted a Dispensary Commission. The direction is that the appellants take this property, sell it, collect debts, and when the proceeds are in hand, pay off the just liabilities of the State Dispensary.
>
> The Act then provides for the payment of certain expenses incident to the discharge of the duties devolving upon the Commission, and after that the residue to be paid to the State.
>
> We undertake to say that there is scarcely to be found recorded anywhere, an assignment by a debtor for the benefit of creditors more intelligently constructed or more readily understood."

This statement by the learned Court is ingenious, but is not borne out by analysis of the Act. It is particularly erroneous in two particulars: In stating (1) that the Act in question passes title as well as possession of the property to the five Commissioners. (2) That the provision that the Commissioners, after paying the expenses incident to the discharge of their duties and the liabilities of the Dispensary, shall pay the residue to the *State.*

It does neither of these two things. Certainly by no express language contained in the Act does it pass title in the property to the Commissioners, nor does it impliedly do so. The Act lacks one of the most essential elements of an assignment for the benefit of creditors or

the creation of a trust estate. *It makes no conveyance of the property.*

All that it does is to confer power of attorney upon agents, created by its terms to deal with property belonging to the State, and the title to which still remains in the State. The agents are merely instructed to take property, the title to which remains in the State, and by virtue of the power of attorney conferred upon them, to convert this property into money, and after they have ascertained and determined to their own satisfaction what may be the just liabilities of the State growing out of the operation of its Dispensary, to pay those liabilities, and to pay also other expenses which may be incurred in the discharge of their duties, holding and keeping possession of the funds thus realized until all the duties imposed upon them have been discharged, and then, not to pay over to *the State* the residue, but to transfer the unexpended balances in their hands from them, special officers of the State, to the *State Treasurer,* another officer of the State; the regular custodian of the State's funds.

The Act does not contemplate either an assignment or trust, but a liquidation, and that liquidation to be made by the State through its own officers. The Act of the General Assembly of the State of South Carolina in thus providing for the liquidation of the business of the State Dispensary, may be analogized to a resolution by the stockholders of a solvent private corporation, directing the President of the Corporation to appoint a Committee from their own number, to wind up the affairs of the corporation, to reduce all of its assets to money, ascertain its liabilities, and after paying the expenses incurred in and about the duties to be performed by them, and discharging the just liabilities ascertained by them to be

due, to distribute among the stockholders the residue of funds in hand. In such a case the corporation does not part with the title to its property, and does not lose control over the administration of its affairs. The Committee so appointed are mere agents of the corporation, to audit its accounts, collect in its assets, and wind up its affairs, and should the stockholders at any time after the passage of such a resolution be dissatisfied with the manner in which the Committee in question is discharging its duties, the corporation, through its stockholders, still reserves the right to modify or limit the powers of this Committee, or to revoke their powers entirely, and to proceed with the liquidation through its own corporate acts, or through the aid of such other machinery as they may see fit to provide for. In no sense would such a resolution create a trust or an irrevocable agency, which the creditors of the corporation would have the right to invoke the aid of a Court of Equity to enforce. The rights of those creditors would be as they always were, the right to sue the corporation for the recovery of their debts; for the mere process of liquidation would not terminate the corporation's existence, or render its assets no longer subject to judgments properly rendered against it.

The present case does not differ in principle from this, and differs in fact only that the creditor may not sue the State of South Carolina, because of the immunity from suit granted to it by the Federal Constitution, but this is a risk that the creditor took when he dealt with the State, and does not change the rule of law.

Indeed, one may easily surmise that this very lack of remedy or rather lack of right to sue the real debtor, has

lead the Circuit Court and the Circuit Court of Appeals to wander away from the paths of legal rectitude, in the effort to aid the creditor to obtain a judicial determination of his rights.

This Court has already decided, in a case bearing many marks of similarity to the one at bar (the case of Florida vs. Anderson, 91 U. S., pp. 667 to 690), where the Legislature of the State of Florida, by enactment created the "Internal improvement fund of the State of Florida," and vested the absolute title of that fund in a commission composed of the Governor, the Comptroller, the Treasurer, the Attorney General, and the Registrar of State lands, and their successors in office, "in trust to dispose of the same, and invest the proceeds; with power to pledge the fund for the payment of interest on the bonds which might be issued by any railroad companies constructing roads on lines indicated by the Act", that the trustees were merely agents of the State, invested with the legal title of the lands, for their more convenient administration. The Court in that case, says:

> "From the statement already made in reference to the history and character of this fund, and the duties of the trustees in regard to it, it is apparent that the trustees are merely agents of the State, invested with the legal title of the lands for their more convenient administration, and that the State remains in every respect the beneficial proprietor, subject to the guarantees which have been made to the holders of railroad bonds, secured thereby. The residuary interest in the fund belongs to the State. The fact that the trustees consist of the Governor and other Executive officers, and that they are charged with the duties of drainage, reclamation and settlement of the public lands (duties of a purely public character), shows that they are mere public Agents, invested with an important branch of the State administration."

So that, it being conceded for the sake of argument that the effect of the Act of February 16, 1907, was to vest the title to the State Dispensary property in the Commission, and to render them trustees in a certain sense, they became trustees for the State, and no one else; the State remaining the beneficial proprietor. The Commissioners were the mere agents of the State, exercising rights in the property for its more convenient administration, and the fact that the Commissioners are charged with the duties not only of closing out the entire business and the property of the State Dispensary, by disposing of all goods and property connected therewith, by collecting all debts due, and by paying from the proceeds thereof to all just liabilities, at the earliest date practicable, but by Section 8, of said Act, are invested with the power and authority to investigate the past conduct of the affairs of the Dispensary, together with the power and authority conferred upon a certain Committee of the Legislature, under an Act approved January 24, 1906, which includes the right to withhold the payment of any claims against the State Dispensary, which they may deem advisable, until the same is duly proven by production of the books of original entry, etc., etc., shows that they are mere public Agents, charged with the performance of an important public duty.

See also Railroad Companies vs. Schutte, 103 U. S. 118;

Littlefield vs. Improvement Fund Trustees, 117 U. S. 419;

Vose vs. Trustees, 1st Woods, 647;

Vose vs. Trustees, 2d Woods, 647;

Union Trust Co. vs. Southern Inland Navigation Co., 130 U. S. 567.

But much reliance has been placed by the opposing Counsel and by the Court of Appeals upon the case of McKee vs. Lamon, 159 U. S., Page 322, and the language of the Court there appearing, which follows:

> "There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law. The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee, to devote it to the purposes intended by bailor."

When that expression of the Court is considered in connection with the facts of the case then under consideration, it is seen that it in no wise militates against the conclusions for which we are now contending.

The Choctaw Nation had contracted to pay a certain percentage for services rendered to it in procuring a certain sum from the Government of the United States, claimed to be due to that Nation. The services had been rendered, the money had been appropriated by Congress, and paid over to the Choctaw Nation. The percentage of this money to be paid to certain persons for their services rendered, had been paid into the hands of McKee under an agreement that McKee should hold the money as Trustee for the persons who had rendered the services, and should distribute it in accordance with their several claims against it. The Choctaw Nation having parted with the money, and McKee having received it, the Choctaw Nation had no further interest in it, either direct or indirect, present or residuary. The Choctaw Nation was not even interested in ascertaining who was entitled to the fund, or whether the claimants against the funds

had just claims or unjust claims. McKee was in no sense an agent of the Choctaw Nation, but became distinctly and admittedly the agent or trustee for the persons entitled to divide the fund. McKee had no duty to perform other than the mere payment of the money to those entitled to receive it. McKee was under no obligation to account to the Choctaw Nation in any manner, for his actings and doings. He was not under bond to the Choctaw Nation for the faithful performance of his duties. His position in the matter bore no resemblance to that of the Commission appointed under the Act of February 16, 1907, for winding up and investigating the State Dispensary business in South Carolina.

The State Dispensary Commission of South Carolina is accountable only to the State. Each Commissioner was required to give a bond to the State under the terms of the Act, for the faithful performance of his duties, included in which was the duty to pay no debt that was not a just debt.

The Dispensary Commission were agents of the State, exercising delegated legislative powers, subject to the control of no one else, except the State, acting through its Legislature, and subject at all times to the will and direction of that Body. In short, the facts disclose that in the one case the custodian of the money was acting as agent for the creditors, and in the other case as agent for the debtor, with the agency in the first case confined strictly to the duty of paying over certain moneys to those entitled to it, and in the second case, where the principal purpose of the agency was to wind up and investigate the Dispensary business, and incident thereto to pay off the just liabilities.

The holders of just liabilities against the State of South Carolina, whose claims arose out of the Dispensary business, acquired no new or larger rights after the passage of the Act of February 16, 1907. They were always entitled to have their claims paid, but that right accrued before this Act was passed. Nothing has been done by the creditor upon the faith of the Act of February 16, 1907, which will impart to his claim a new contractual value. Therefore no rights accrued under that Act of the General Assembly, which precluded the General Assembly from further dealing with its own property in the hands of its own Commission. Unless, therefore, under the provisions and by virtue of the powers conferred upon them in the Act of February 16, 1907, the Dispensary Commission had entered into contracts based upon good and valuable considerations arising since the passage of said Act, the Legislative control over the funds in their hands, has never been in the slightest degree impaired, and the General Assembly of the State of South Carolina had the right at any time to modify or alter, enlarge or decrease, the powers of this Commission, or to revoke the enactment entirely, if in their judgment it was deemed best. So that, if after the bills were filed in the pending cause, and before any judgment was rendered thereon, the General Assembly of the State of South Carolina, passed an amendatory Act as they did in February, 1908, making more certain the powers of the Commission, and vesting in that Commission the sole right to determine the question as to whether a debt against the State Dispensary was just or unjust, that legislation should be given full force and effect by the Court, even in the pending cause.

SECOND QUESTION.

It is not our purpose here to carefully analyze all of the decisions which have been made by this Court as to when a suit may be brought against officers of a State, without its being regarded as a suit against the State, or when such a suit will be so regarded. Suffice it to say that a careful consideration of them all discloses that there is really no conflict between them and that the rule upon the subject is well defined and clear.

In a general way, the rule as it applies to the case at bar may be stated to be as follows:

That where the officers are performing a mere ministerial duty without any discretionary powers, and they either attempt to act contrary to their powers or refuse to exercise them, a person injured may invoke the aid of Court having jurisdiction, because it is not the State so acting, but it is the officers who are acting contrary to the law of the State, and not in pursuance of it; but where the State has conferred upon its officers any discretion in the exercise of the duties imposed upon them, their exercise of that discretion is the act of the State, and a suit against them attempting to control that discretion, is a suit against the State. Tested by this rule, this case is clearly one against the State of South Carolina.

The contention of the Counsel representing the Respondents, and the foundation of the decision rendered by the Circuit Court of Appeals, as well as the Circuit Court, is that the creditors have a right to proceed against the Commission for the purpose of having a judicial determination of the validity and justness of their claims. It is not contended that by the Act of February

16, 1907, the General Assembly of the State of South Carolina, either directly or indirectly consented that the State could be sued, so that the determination of this question rests as above suggested, upon the question as to whether or not a suit against these officers, that is to say, the Dispensary Commission, is, in effect, a suit against the State, because these officers are exercising a ministerial duty without discretion, and have refused or failed to perform that duty.

In the first place, by the Act of February 16, 1907, the power and authority was conferred upon the Dispensary Commission, to determine for themselves whether a debt was a just or an unjust debt, before paying it. Indeed, there can be no other reasonable construction put upon the Act. It is expressly provided in the Act that the Commission shall pay all of the just liabilities out of the funds coming into their hands. Unless the Commission has the implied right to determine the question as to whether a liability is just or unjust, how is it going to perform this duty at all? The Commission can not presume that every liability claimed is a just liability. It must be invested with some power to investigate and determine the question of its justness or unjustness. It has no power to pay a debt that is not a just liability. It must be intended that the Commission shall have some way to determine the question of justness in connection with the liabilities. It is clearly not contemplated that the Commission shall seek elsewhere than in its own Council for a decision as to whether a given debt is just or unjust. The very duty imposed upon the Commission to pay a just liability, and only a just liability, must include the right to determine in the exercise of its judgment and discretion, whether the debt in question is just

or unjust. Having once determined that question, then its power becomes absolute, and its duty becomes plain, but it must always first exercise that judgment and discretion, before it is called upon to perform any other duty at all. This is made clearer by a consideration of other parts of the Act of February 16, 1907, and by a consideration of all of the legislation on the subject preceding this enactment. It is clear from an examination of the legislation upon the subject, that the Legislature was impressed with a doubt that the affairs of the Dispensary had been honestly conducted prior to its abolition on February 16, 1907, and believed there had existed a conspiracy or conspiracies between the venders of liquors and the State's purchasing agents, by virtue of which the State had been defrauded of large sums of money. Whether the claims of certain creditors of the State arising out of the Dispensary were just or unjust was therefore, a question of grave doubt in the Legislative mind. The very employment of the word "just" in connection with the payment of liabilities in the third section of the Act of February 16, 1907, indicates a legislative doubt on this subject. Ordinarily it would have been sufficient to say that the Commission should pay all liabilities because that term alone necessarily means obligations for which the State is legally and unquestionably liable, but in order that the Commission might be impressed with the necessity of carefully investigating the liabilities arising out of the Dispensary business, it was expressly directed to pay only the *just* liabilities. But this is not the only provision in the Act throwing light upon this subject. Section 8 confers upon the Commission full power and authority and consequently imposes upon it, the duty to investigate the past conduct

of the affairs of the Dispensary. This duty necessarily includes an investigation of the transactions between the State's representatives conducting the Dispensary and the vendors of liquors, who had dealt with them. If, by reason of this investigation, it is disclosed that a certain claim against the State is impregnated with fraud and injustice, it would then become the plain duty of the Commission to decline to pay the claim, perhaps to decline to pay it in toto, though only partly unjust, leaving it to the General Assembly of the State to determine what further disposition should be made of it. But in connection with the power to investigate the past conduct of the affairs of the Dispensary, the Legislature expressly conferred upon this Commission all the power and authority which had been previously conferred upon a Committee of the Legislature, also appointed to investigate the affairs of the Dispensary, in an Act of the General Assembly approved the 24th of January, 1906; and in the power and authority contained in the Act just referred to, was included the right to decline to pay any claim until the creditor had produced all his books, papers and correspondence connected with and leading up to the transaction with the State, and show to the satisfaction of the Commission a clean record in his dealings. Clearly, therefore, this Commission is an administrative body, invested with certain discretionary powers, and particularly a discretion relative to the question as to whether a liability of the State growing out of the Dispensary is just or unjust, and under the rule above referred to, the Court has no right to exercise that discretion for the Commission, and any suit which may be brought against them, intending to force the Commission to exercise this discretion one way or another, or seeking to take away

from it that discretion and place it with the Court, is a suit against the State because it is the discretion of the State exercised through its officers, that is sought to be interfered with, and not the act of the officers themselves, in the performance or non-performance of a pure ministerial duty.

But if, for the sake of argument, it be conceded that the Dispensary Commission had no discretion to determine whether a liability was just or unjust, the creditors are in no better situation by reason of that fact.

In order to enable them to invoke the aid of a Court of Equity against these officers, without having the jurisdiction of the Court ousted upon the ground that it is in effect a suit against the State, it is imperative that the plaintiffs in those suits show that it is necessary for the Court to maintain its jurisdiction in order to protect private rights, by requiring State officers to perform a plain ministerial duty imposed by law.

And this is what they say they are seeking to do; but how are their private rights to be protected in this way, if the ministerial officer has no right to determine what is a just debt; because if this is true, the ministerial duty imposed upon him can not be exercised.

Indeed, if they have no such discretion, the Act is fatally defective in failing to provide how the justness of the debt may be ascertained. The Court can not force the State officers to perform a ministerial duty which is not imposed upon them, nor in the absence of an express grant on the part of the State to the creditors to bring suit against either the Commission or the State for the purpose of ascertaining whether their debts are just or

unjust, the Court has not jurisdiction for the sole purpose of determining this question.

In effect, the contention is that though the Court has the power only to compel the performance of a plain ministerial duty, in order to exercise that power, it will first determine a question which was not one of ministerial duty to be performed at all, that is to say—that by a suit against the Commission, who have nothing to do with the question as to whether the State justly owes the debt or not, to which the State is not a party, and in the defense of which the Commission is under no duty, the Court will determine the rights of the creditors and the State respectively, and having thus determined what are just liabilities, force the Commission to perform its duty. A mere statement of the proposition is sufficient to make clear that a suit having for its real purpose the determination of the question as to whether the liability is a just one, is a suit against the State. The liability is the State's, not the Commission's.

Of course, what we have just said relates entirely to the Act of February 16, 1907, but whether our contention as to it is correct or not, surely the Act of February 24, 1908, amending the first Act mentioned, removes all doubt about the question.

Under this Act it is clearly the duty of the Commission to investigate and determine whether a liability is just or unjust, and no Court can take away that discretion and power from it, and no suit can be brought against the Commission, the object of which is to interfere with the exercise of that discretion and power, which is not inhibited by the Eleventh Amendment of the Constitution of the United States.

We apprehend that no dispute would be made as to this proposition, if it were not for the contention of respondents that certain rights accrued to the creditors under the Act of February 16, 1907, which could not be impaired by the passage of the Act of February 24, 1908, but as we have before seen, the passage of the Act of February 16, 1907, created no new contract between the creditors of the State, and it does not appear that any creditor has acted to his harm or detriment on the faith of this enactment, and unless this is so, the power of the Legislature over the subject matter is unaffected.

As stated by Mr. Chief Justice Taney, in the case of Beers vs. Arkansas, 20 Howard 527, when the State had given its consent to being sued, and suits were pending:

> "It may withdraw its consent whenever it may suppose that justice to the public requires it."
>
> See also; In re Ayers 123 U. S. 505;
>
> City of Sioux Falls vs. Farmers Loan & Trust Co., 136 Fed. 721, 731;
>
> Royston vs. Miller, 76 Fed. 50, 53;
>
> Levy vs. Stockclager, 129 U. S. 470, 477, 478.

But in any event the State is an indispensable party to the suit, and since it can not be made a party by reason of its immunity from suit under the Federal Constitution, the jurisdiction of the Court must fail.

The learned Judge rendering the decision for the Circuit Court of Appeals, uses this expression:

> "The fund being in the hands of the Commission charged with this duty (of paying the just liabilities) the State has no interest in so much thereof as is necessary to pay the just debts. Then how can it infringe any right of the State to have the true amount of the debts due by the defunct Dispensary, judicially ascertained."

But, is it true that the State has no interest in so much of the fund as is necessary to pay the just debts? Whose debt is in controversy? Has a debtor no interest in the determination of the question as to whether the debt claimed against him is just or unjust? Is no right of the debtor infringed by the determination by a Court that his debt is a just debt, without his day in Court? It is never to be presumed that a Court with all the facts before it, will not rightly determine the issues between parties, but if it may enter into the determination of these issues, without having the interested parties before it, the absence of the parties would never be a matter of importance, and no Court would decline jurisdiction for the want of parties. The very object of having the parties before the Court, who are really interested in the controversy, is that the Court may be informed of the contentions of both parties, and may consider the facts that each party may be able to adduce.

The rule is that all persons materially interested, either legally or beneficially in the subject matter of the suit, are necessary parties to it.

> Minnesota vs. Northern Securities Company, 184 U. S., Page 199.

It was also held in the case of Florida against Anderson, 91 U. S., Page 676, already referred to in this argument, that the State of Florida had such an interest in the "Internal improvement fund" there under consideration, as to entitle it to file an original bill in the Supreme Court of the United States (which alone the State could do) when the interests of that fund were involved.

THIRD QUESTION.

It is a well established rule of this Court that the construction by a Court of last resort of a State, of a statute of that State, will be accepted by the Supreme Court of the United States as controlling.

The decisions of this Court to this effect are so numerous that it would not be profitable to even attempt to cite them all, nor quote from them all at length, but a reference to a few of them will not be out of place at this point.

In the case of Wilson v. North Carolina, 169 U. S. page 593, the Court says:

> "The highest Court of the State has held that this statute was not a violation of the Constitution of the State, that the hearing before the Governor was sufficient, that the office was substantially an administrative one, although the Comimssion was designated, by a statute subsequent to that which created it, a Court of record, that the officer taking office under the statute was bound to take it on the terms provided for therein, that he was lawfully suspended from office, and that he was not entitled to a trial by a jury upon the hearing of this case by a trial court.
>
> "As a result, the Court held that the defendant had not been deprived of his property without due process of law, nor had he been denied the equal protection of the laws.
>
> "The controversy relates exclusively to a title to a State office created by a statute of the State, and to the rights of one who was elected to the office so created. These rights are to be measured by the statute, and by the Constitution of the State, except in so far as they may be protected by any provisions of the Federal Constitution."

"Authorities are not required to support the general proposition that in the consideration of the Constitution or laws of the State, this Court follows the construction given to these instruments by the highest court of the State. The exceptions to this rule do not embrace the case now before us. We are, therefore, concluded by the decision of the Supreme Court of North Carolina as to the proper construction of the statute itself, and that as construed, it does not violate the Constitution of the State."

In Hartford Fire Insurance Company v. Chicago, etc. Railway Company, 175 U. S., page 100, this Court says:

"Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union—one not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law, or of general jurisprudence of national or universal application—are governed by the law of the State, as expressed in its own Constitution, or statutes, or declared by its highest Court."

In the case of Forsyth v. Hammond, 1566 U. S., page 520, this Court says:

"The case of Burgess v. Seligman is largely relied upon in the opinion of the Court of Appeals, but there are several reasons why that authority does not justify its action. In the first place the decision of the Supreme Court of the State was rendered before the filing of this bill in the Circuit Court of the United States, and not as in the Burgess case after the judgment in the Circuit Court. In the second place the decision was upon a question of a local nature, involving the internal policy of the State, and therefore is such a decision as should be, generally speaking, recognized and followed by the Federal Courts."

And in the case of the Western Union Telegraph Company v. Poe, decided by Judge W. H. Taft, sitting in Circuit, and reported in 64 Federal Reporter, page 9, the Court says:

> "Where a Federal Court decides, on demurrer, that a State statute, the validity of which has never been passed upon by the highest Court of the State, is in violation of the Constitution of such State, and afterwards, but before a final decree is entered in the Federal Court, the State Supreme Court decides that such statute is constitutional, the Federal Court will reverse its former ruling in deference to the decision of the State Court."

In the State Railroad Tax cases, 92 U. S. 575 to 618, the Circuit Court of the United States had held that an Illinois tax law was invalid, because in violation of the State Constitution, a final decree having been entered to this effect. The case was appealed to the Supreme Court of the United States. After the final decree in the Circuit Court of the United States, but before the case was reached in the Supreme Court of the United States on appeal, the Supreme Court of the State of Illinois decided that the law was valid, and not violative of the State Constitution. This being called to the attention of the Supreme Court of the United States, that Court reversed the decision of the Circuit Court, Mr. Justice Miller using the following language in connection therewith:

> "But if for no other reason, we should reverse the decrees of the Circuit Court in these cases, because the same questions, involving the same considerations urged upon us here, have been decided by the Supreme Court of the State of Illinois in a manner which leads to the reversal of these. As the whole matter concerns the validity of a State law, as affected by the Constitution

> of the State, that question, and the other one of the true construction of that statute, belong to the class of questions in regard to which this Court still holds, with some few exceptions, that the decisions of the State Courts are to be accepted as the rule of decision for the Federal Courts. It is nevertheless a satisfaction that our judgment concurs with that of the State Court, and leads us to the same conclusions."

To the same effect was the decision by this Court in the case of Snyder v. Williamson, 24 Howard, 127, and in the case of Fairfield v. County of Gallatin, 100 U. S., page 47.

The statute of February 16, 1907, involved exclusively matters connected with the internal administration of the affairs of the State of South Carolina.

The matters involved were: the winding up and the investigation of the affairs of the State Dispensary, in connection with which the Commissioners appointed under the Act were required to collect in all of the assets growing out of the business done by the State Dispensary, and to disburse the same in accordance with the provisions of the Act. The assets and money so to be disbursed were the assets and money of the State of South Carolina. The debts to be so paid were the debts of the State of South Carolina The debts grew out of contracts made and to be performed in the State of South Carolina. The matters dealt with in the Act are not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or general jurisprudence of national or universal application, but were and are governed entirely by the Constitution and laws of the State of South Carolina. The construction of the Act of February 16, 1907, involved

questions of a purely local nature involving the internal policy of the State.

No constitutional question is involved in the suits brought by the creditors against the State Dispensary Commission; that is to say, no relief is sought by the complainants in these suits which require the determination of any Federal question. The only Federal question which is raised in the litigation is one which is raised by the Dispensary Commission, which goes only to the jurisdiction of the Court. The determination of the validity of the contracts between the creditors and the State of South Carolina, the determination of the justness of the claims made by these creditors against the State of South Carolina, the determination of the powers and duties of the Dispensary Commission, under the provisions of the Act of February 16, 1907, are all of a local nature, dependent upon the Constitution and laws of the State of South Carolina, and in no wise involving the application of the Constitution of the United States, or any of the Federal laws. Clearly, therefore, it is a case in which the rule laid down by this Court, relative to the conclusiveness of the decision of the State in question, applies.

The case of Burgess v. Seligman, 107 U. S., page 33, is relied upon by the Circuit Court of Appeals as supporting the conclusion reached by it that the decision of the Supreme Court of South Carolina, interpreting the decision of the Act of February 16, 1907, should not be controlling upon the Federal Court. But this case is not in point: first, because the final decree in that case had been rendered before the Supreme Court of the State made its decision upon the same subject, and second, because the matters involved in the case of Burgess v. Selig-

man were not purely and exclusively of a local nature, involving the internal policy of the State, but clearly involved questions of general jurisprudence.

In the case at bar, no final decree has been rendered by the United States Circuit Court, but an interlocutory order only. The case is still a pending cause; the final disposition of it is still within the control of the Court; the questions involved in the case have not been adjudicated between the parties; nothing has been done which is final.

A timely application was made to the Circuit Court below by the Dispensary Commission, to revoke the interlocutory orders which had been passed in the pending cases, because of the decision made by the Supreme Court of South Carolina, involving the same questions. Which was denied; and one of the assignments of error made in the case was the refusal of the Court to revoke these orders, when this motion was made.

Under the rules of law above stated, supported by the authorities above quoted, it was the duty of the Circuit Judge, upon the making of this motion, to have accepted the decision of the Supreme Court of South Carolina upon the questions involved, and to have revoked his orders and dismissed the bill.

It is true that the Supreme Court of South Carolina, in the decision rendered by it, held, among other things, that the suit by these creditors against the Dispensary Commission was in effect a suit against the State, and inhibited by the eleventh amendment of the Constitution of the United States. But even if we eliminate that feature of the decision from our present consideration, in so

far as it should be binding upon the Federal Court, the decision also disposed of the vital question in this case, and the one upon which the complainants in the Court below rested their case, namely: that the Act of February 16, 1907, created a trust in favor of the creditors of the State, growing out of the Dispensary, which a Court of Equity had the right to enforce. Now, as to whether this Act did create a trust, depends upon the construction which is to be given it, in the light of the laws and the Constitution of the State of South Carolina, and the Supreme Court of South Carolina has rendered a deliberate judgment that this enactment did not create a trust, was not intended by the Legislature to have this effect at all, but that the Commissioners provided for in said Act were mere agents and officers of the State, acting for and in behalf of the State.

It is conceded by the opposing counsel, and by the Circuit Court of Appeals, that if the Act of February 16, 1907, did not make the Commission trustees, and create a trust in the fund in hand, in favor of the creditors whose claims arose out of the operation of the State Dispensary, the Circuit Court of the United States, sitting in Equity, would have no jurisdiction of the case. Therefore, whatever else may be said with reference to the other questions which have been raised in this case, if the decision of the Supreme Court of South Carolina must be followed upon this question, then the decision of the Circuit Court of Appeals is erroneous, and the original bills should be dismissed.

But this Court, in the case of Osborne v. Florida, 164 U. S., pp. 650 to 656, accepted the ruling of the Supreme Court of Florida in the construction of the statute of that State, even though the effect of that ruling

was to decide that the statute in question did not contravene the Interstate Commerce Clause of the Constitution of the United States.

It is contended, however, that the decision in the Supreme Court of South Carolina was the result of a collusive suit brought for the purpose of having that Court decide the questions involved in this case, so as to affect its final disposition. Such was the contention made in the case of the Western Union Telegraph Company v. Poe, 64 Federal Reporter, pp. 11 and 14, but Judge Taft, in disposing of that question, there rightfully holds that though it appear that the case was a test case brought before the Supreme Court of the State in a summary way; though it appear that it was brought in the State Court in order to anticipate the determination of the questions pending in the Circuit Court of the United States, and though all the facts tended to show the friendly character of the proceeding, it also appearing that the opinion of the Supreme Court of the State was made after argument and the filing of printed briefs, and that the Supreme Court of that State regarded it not as a moot case, but one calling for consideration by them, due respect for the judgments of the Supreme Court of Ohio made it indelicate for that Court to question the propriety of such a ruling in respect of a case plainly within its jurisdiction.

See also, Adams Express Company vs. Ohio, 165 U. S. 219.

FOURTH QUESTION.

According to the contentions of the complainants in the Circuit Court below, and according to the decisions

rendered by the Circuit Court and the Circuit Court of Appeals, granting the interlocutory orders prayed for by the plaintiffs in said suits, the right of the complainants to seek the aid of a Court of Equity is predicated exclusively upon the proposition that the Act of the General Assembly of South Carolina, of February 16, 1907, created a trust in the Commissioners appointed under the provisions of that Act as to the fund coming into their hands, in favor of the creditors whose claims arose out of the operations of the State Dispensary, and that those creditors were entitled to seek the aid of a Court of Equity in order to enforce the terms of that trust. The only issue alleged to exist between the complainants and the Dispensary Commission is as to whether the complainant's debts are just or unjust, and the aid of the Court is invoked primarily to determine that question, in order, if it be determined in favor of complainants, that, this question being established, the Dispensary Commission may have no further cause for declining to pay their claims. It is not alleged or shown that if the claims are established to be just claims, the Commission would refuse to pay them.

It is alleged that there is some danger that the funds will pass out of the hands of the Commission and out of the jurisdiction of the Court, by virtue of some contemplated legislation in the Genera Assembly of South Carolina, but the facts disclosed by the record are that the legislation feared did not undertake to remove the funds from the hands of the Commission, or to prevent the payment of a just claim, and if that legislation is void, in so far as it affects the rights of the complainants—and to support the decision of the Circuit Court of Appeals it must be so regarded—it is a matter of no importance

whether such hostile legislation be contemplated or not. There is no direction in the feared legislation that the funds shall pass out of the hands of the Commission, and there is no allegation or proof justifying the conclusion that it is the purpose of the Commission, or of the Legislature of South Carolina, at any time to pass the funds out of the hands of the Commission, so that it would not be reached by the decree of the Court.

The complainants, therefore, if they have a right to sue the Commission at all, have adequate remedies at law. It is only necessary that they shall sue the Commission at law on the claims made by them against the State Dispensary, and obtain a judgment establishing the validity and amount thereof, in order to fully protect their rights. Why should a court of equity interfere in the matter? What equitable relief are complainants in the suits pending below entitled to? What other thing need they do than to establish their claims as just liabilities? Does there appear to be any danger of waste of the funds in the hands of the alleged trustees? Does there appear to be any danger of a misappropriation of the funds in the hands of the alleged trustees? Does there appears to be any abuse of power on the part of the alleged trustees? Does there appear to be any failure on the part of the alleged trustees to execute the trust? If a trust was created by the Act of February 16, 1907, it limited the power of the trustees to the payment of just liabilities, and there is no issue between them and the creditors except the determination of that question. There is no failure to execute the trust, if they refuse to pay the liabilities because they are not just liabilities, and if the Court has the power of determining that issue between the creditors and the Commission, it is not a court

of equity that must be called upon to determine it, but a court of law.

As to some of the creditors who appear either as original complainants or intervenors in one of the two cases, it does not even appear that they had ever submitted their claims to the Commission for consideration, or that the Commission had ever denied that they were valid and subsisting and just liabilities, or that they had ever refused to pay them.

In no proper sense is this a suit by and in behalf of creditors generally, or beneficiaries generally. The Commission might, and the record shows that they did, recognize a large number of claims as just liabilities. The justness or unjustness of each particular creditor's claim stands upon the particular facts applicable thereto. There is no general state of facts applicable to all of them, but each creditor must stand or fall upon the merits of his own contention. A bill in equity will not be entertained for the purpose of avoiding a multiplicity of suits, unless all the suits are predicated upon practically a common cause of action.

Unless the procedure at law is incomplete or inadequate, a court of equity will not interfere, unless the Trustee either refuses to act, or acts in excess of or in abuse of his power; and even then danger to the trust fund or property is a prerequisite to the grant of an injunction or to the interference of the court with the trustee's possession. See 3d Pom. Eq., Sec. 1334; 23 Am. & Eng. Enc. of Law, 1012; 2 Beach on Trusts and Trustees, Sec. 686, 688; Edwards on Receivers, Sec. 77; Manhattan v. Walker, 130 U. S. 467; Ford v. Taylor, 137 Fed. 150.)

And it must be a very strong case, indeed, which would induce the Court to take the property (in the hands of agents of the State) out of their hands, and put it into the hands of its own officers.

Vose v. Reed, 1 Woods, 644.

Even though all trusts are within the special jurisdiction of courts of equity, that jurisdiction will not be exercised, when there is a full and adequate remedy at law.

Thus, in the case of Day v. Washburn, 24 Howard, 352, the jurisdiction was sustained, because there was a fund which a court of equity *only* could reach.

In the case of Case v. Beauregard, 101 U. S. 691, jurisdiction was sustained because, as the Court said:

> "But when the bill asserts a **lien** or a **trust**, and shows that it may be made available **only** by the aid of a chancellor, it obviosuly makes a case for his interference."

In the case of Clews v. Jamison, 182 U. S. 461, the Court said:

> "The jurisdiction of the Court below was plainly established, **because**, under the circumstances, the complainant had no adequate and full remedy at law."

In the case of Weyman v. Wallace, 101 U. S. 230-240, the only question involved was whether the beneficiaries could go into equity without exhausting legal processes or remedies.

The only distinction on principle and authority between the beneficiary of a trust and an ordinary creditor is that one can, and the other can not, go into equity without exhausting all legal processes or remedies; but it is equally elemental that neither one nor the other can

go into equity, if the remedy at law is complete and adequate

All of the material allegations in the bills filed in the Circuit Court were sworn off by the answers, nor was there any evidence submitted in support of the bills to overcome this; therefore, upon the case made, the Court was not justified in granting an injunction or appointing receivers pendente lite. See:

2d Daniels Chancery Practice, 6th Edition, page 1667; 1st Bates Fed. Equity Procedure, Secs. 531, 587; 2d Hill on Injunction, 4th Ed., pp. 1540, 1542, 1543; 17 A. & E. En. Pl. & Pr., p. 738; 10 Ibid. 929; Rider v. Bateman, 93 Fed. 1625.

The Circuit Court of Appeals, in dealing with the question which we are now discussing, finds that the bill and the testimony in support of it are sufficient to authorize a decree for injunction and receivers, because:

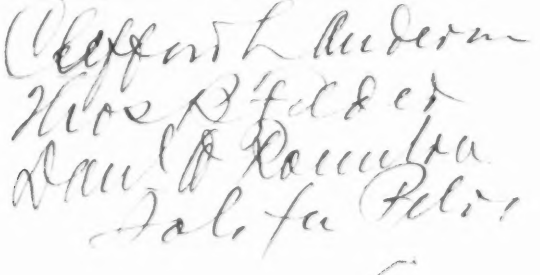
> "The bill alleges a just debt still existing and unpaid for liquors sold to the Dispensary authorities by the complainant. It is further alleged that said debt has been audited by the agency employed by the appellants and has been found to correspond with the entries upon the books kept by the State Dispensary Board, and further, that the appellants refuse to pay complainant's debt from the funds in their hands, set apart for that purpose. If these allegations are true, the complainant has the right to invoke the aid of the Court. The appellants, in their return to the order to show cause, in paragraph 11, substantially deny the validity of the complainant's debt in the following language: 'The Commission is advised by the Attorney-General and his associates that the claim of the plaintiff for goods sold by it to the State Dispensary is unjust and invalid, which they have evidence to establish.' This is a practical admission that

> the appellants did not intend to pay complainant's debt from the fund in their hands. His only recourse, therefore, was by an appeal to a Court of competent jurisdiction to determine as to whether or not his debt was just, and if so, to require the appellants to pay it from the fund in their hands for that purpose declared, and also to have the fund preserved to that end."

But from what standpoint did these facts, if true, justify a court of equity in granting an injunction against the Commission, or appointing receivers to take the funds out of their hands. These statements by the learned Court may go to establish that the creditor had a right to invoke the aid of the Court to establish the question as to whether his debt was just or not, but he did not need a court of equity to establish this point; an ordinary suit at law was sufficient. The bill and the testimony in support of it did not justify the conclusion that an injunction was necessary in order to preserve the fund. On the contrary, the case, as made, disproved any idea of wastfulness, misappropriation, or improper disposition, or the removal from the jurisdiction of the court of the fund in question. And as to the order appointing receivers for said fund, there does not seem to be the remotest excuse for this action of the Court. There is no charge, or suggestion, that the trustees are either incompetent, incapable, or improper persons to execute the trust. The bill is predicated upon the idea that there is a trust, and the creditor has the right to invoke the aid of a court of equity to enforce it, and yet the Court proposes to take away from the alleged trustees the possession of the fund, deprive them of all power to carry out the provisions of the Act alleged to have created a trust, and through its own officers to attempt to execute the trust, rather than to enforce it; and that the Court was

impressed with the character and capacity of the Commissioners to perform the trust alleged to have been imposed upon them under the Act, is borne out by the fact that it appoints them as its own receivers, and speaks of them in its opinion in the highest terms.

The Act of the Legislature providing for the appointment of this Commission evidently relied upon their patriotism in a large measure for proper service to the State, and provided that their compensation should be merely nominal; yet men of such excellent character and business standing as these gentlemen, selected by the Judge himself as proper persons to be receivers of his Court, with this insignificant emolument attached to the office, accepted the positions and undertook to carry out the provisions of the Act. What need, then, for the additional expense of receivers whose compensation must be paid from the funds seized by the Court? What need then for the grant of any equitable remedies increasing the expenses of the administration of this fund, to the detriment of the State of South Carolina only, when the creditor has an adequate remedy at law, the expense of which he must bear himself in establishing by an ordinary suit that his claim is a just liability, and subject to be paid under the provisions of said Act?



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Supreme Court of the United States

OCTOBER TERM, 1908

No. 625

W. J. MURRAY, JOHN McSWEEN AND AVERY PATTON, CONSTITUTING THE STATE DISPENSARY COMMISSION OF SOUTH CAROLINA, et al., *Petitioners,*

vs.

WILSON DISTILLING COMPANY et al., and THE FLEISCHMANN COMPANY, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals of the Fourth Circuit.

BRIEF OF J. FRASER LYON AND B. L. ABNEY, COUNSEL FOR PETITIONERS.

THE STATE CO., LAW PRINTERS, COLUMBIA, S. C.

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STATEMENT OF THE CASE.

The State Dispensary Commission, created by and under an Act of the General Assembly of the State of South Carolina, approved February 16, 1907, was, at the time the bills of complaint in these two suits were filed, engaged in the investigation and hearing of claims against the State Dispensary, and among

them the claims of the complainants. (Record, 45, 186, 57-63.)

This Commission, by the terms of the Act creating it, was expressly given the power and authority to investigate the past conduct of the affairs of the Dispensary, and had conferred upon it all the power and authority which had been given and conferred upon a legislative committee appointed to investigate the affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved on the 24th of January, 1906. See Act, Section 8, set out in the Bill of Complaint. (Record, 20.)

Under Section 3 of the Act of the 24th of January, 1906, the power to send for and to require the production of any and all books, papers or other documents in writing which may be deemed relevant to any investigation, and to require the person or persons in custody or possession of such papers to produce the same before the Commission, was expressly granted: and by Section 5 the right to withhold the payment of any claim against the State Dispensary until the same should be duly approved by the production of the books of original entry, and all documents and correspondence relating to transactions with the State Dispensary, and to have the person or persons in custody or possession of the said books, documents, papers, and correspondence to produce the same, was also granted.

The Commission had made up a roster of the cases and set same down for hearing. It had also issued an order requiring each and every claimant to produce the books containing the transactions relative to its claims, and that the person making such transaction should appear for examination before the Commission. (Record, 45, 186, 57-63.)

This order and notice the complainants refused and declared that they would not comply with, and filed these bills of complaint.

The Bill of Complaint brought by the Wilson Distilling Company was filed in the office of the Clerk of the Circuit Court of the United States for the District of South Carolina on the 31st day of December, 1907, and a restraining order and rule to show cause why the defendants should not be restrained until the final hearing therein was issued by the Hon. J. C. Pritchard, United States Circuit Judge, at Asheville, N. C., on the 30th day of December, 1907. A receiver was not asked for in the prayer of

this bill, (Record, 2). A return and answer to the rule was filed on the 4th day of February, 1908, (Record, 11).

In the meantime the Bill of Complaint, brought by the Fleischmann Company in the Circuit Court of the United States for the District of South Carolina, was filed in the office of the Clerk of the said Court, on January 23, 1908, (Record, p. 17), and a rule to show cause why the relief prayed for in the bill should not be granted and why a receiver should not be appointed by the Court to take charge of and administer the funds in the hands of the defendants arising from the sale of property belonging to the State Dispensary, etc., was issued by the Hon. J. C. Pritchard, Circuit Judge, at Asheville, N. C., on the 21st day of January, 1908, (Record, p. 29), and was made returnable on the 29th day of January, 1908, at the same place. A restraining order was issued by the same judge on the 22d day of January, 1908, (Record, 33). A return by the State Dispensary Commission and the individuals composing it, to the rule to show cause, was made and filed on January 29, 1908, (Record, p. 41). On the 29th of February, 1908, an order was passed continuing the injunction granted in the Fleischmann Company case (Record, p. 86), and on the 5th of March, 1908, Judge Pritchard filed his opinion (Record, pp. 88-99), wherein he held that the Court had jurisdiction in the case, and that the injunction theretofore issued by him should be continued to a final hearing.

On the 29th day of January, 1908, an order was passed in the Wilson Distilling Company case allowing the Anheuser Busch Brewing Company, a corporation of Missouri, and Gallagher & Burton, a firm composed of citizens and residents of the State of Pennsylvania, to be made parties complainant (Record, p. 16).

An order granting leave to file an amended and supplemental bill was also passed, (Record, 104), which said amended and supplemental bill was filed on the 24th day of February, 1908, (Record, 105), and on the same day a rule was issued requiring the defendants to show cause before the Circuit Judge at his chambers in Asheville, N. C., on the 29th day of February, 1908, why the relief prayed for in the bill should not be granted, and why a receiver should not be appointed and an injunction issued as therein prayed for, (Record, 122).

On the said day, the 29th of February, 1908, the hearing upon the rule issued in the Wilson Distilling Company case was continued until the 7th day of March, 1908, (Record, 143), and a further order making new parties defendant was passed on the 3d of March, 1908, (Record, 144). On the 7th day of March, 1908, in accordance with the requirements of the rule, the defendants, Murray and others, composing the State Dispensary Commission, made their return, (Record, 177). It seems, however, that on the day preceding the day fixed for the hearing on the rule to show cause why a receiver should not be appointed, the Circuit Judge, at his chambers in Asheville, N. C., passed an order appointing temporary receivers, (Record, 189).

After hearing the returns made to the several rules issued by him, Hon. J. C. Pritchard, Circuit Judge, at his chambers at Asheville, N. C., on March 7, 1908, passed and filed his order consolidating the two causes, and appointed Joseph A. McCullough, C. K. Henderson and B. F. Arthur receivers, and also continued in full force and effect until the final determination of the said causes, or until the further order of the Court, the restraining orders theretofore issued by him, (Record, 190). Prior, however, to this order, a petition for mandamus had been filed in the Supreme Court of the State of South Carolina, entitled "*The State of South Carolina, ex rel. J. Fraser Lyon, as Attorney-General, Petitioner, vs. W. J. Murray, John McSween, C. K. Henderson, Avery Patton and B. F. Arthur, as State Dispensary Commission, Respondents*"; and a rule to show cause was issued by the Chief Justice of the said Court returnable in the Court on the 4th day of March, 1908, (Record, pp. 232-234). A return was duly made thereto on the said day and a hearing had. Thereafter the Court rendered and filed its opinion, holding that the return of the Commission that it was restrained and enjoined by the order of the United States Circuit Court in the cases there pending from paying out the money in its possession arising from the proceeds of the State Dispensary property, was insufficient, in that the said Court was without jurisdiction to grant such order. It therefore held that the petitioner was entitled to the writ of mandamus from the Court, as prayed for, (Record, 280).

Thereafter the defendants, the State Dispensary Commission, gave notice of a motion to be made before the Hon. J. C. Pritch-

ard, United States Circuit Judge, at Asheville, N. C., on March 27, 1908, to revoke the injunction and receivership orders and dismiss the bills, on the grounds that the Court had no jurisdiction, (Record, 230). Upon hearing the motion on the said day, March 27, 1908, Judge Pritchard refused to vacate his orders and dismissed the motion (Record, 298-301).

The complainants further amended their bills on the 27th of March, 1908, (Record, 302).

Thereafter a petition for allowance of appeal by the State Dispensary Commission of South Carolina, W. J. Murray, John McSween and Avery Patton, constituting said Commission and as individuals, and such other of the defendants as signified their assent to join in the appeal (the defendants, C. K. Henderson and B. F. Arthur, having resigned as Commissioners before this date and their offices as Commissioners being then and now vacant), was duly filed, along with an assignment of errors, which said appeal was allowed and citation issued. The assignment of errors is found in the Record, page 314, *et seq.*

It will not be necessary to refer to the original Bill of Complaint of the Wilson Distilling Company. The amended and supplemental bill makes such material changes that reference to the former bill may be entirely omitted. As the bill of the Fleischmann Company was filed prior to the amended and supplemental bill of the Wilson Distilling Company, we will first state the issues raised by it (Record, 17).

The complainant alleges that it is a corporation of the State of Ohio, and that the defendants are citizens and residents of the State of South Carolina, thus giving the necessary diversity of citizenship to maintain the suit. It then proceeds to allege that prior to the passage of the Act of 1907, hereafter alluded to, it had sold certain whiskies and liquors to the State Dispensary of South Carolina, and that the said Dispensary thereupon became, and was at the time of the passage of the Act of 1907, and still is, justly indebted to it for a balance of $66,501.19, which the State Dispensary Commission had, after certain deductions, agreed to pay and admitted to be due. It further alleges that prior to the passage of the Act of 1907, the State of South Carolina had established an institution for the purposes of buying, selling, and distributing alcoholic liquors within the State, which institution

was known as the State Dispensary, and that its agents and officers were directed and empowered to purchase, in its name and in its behalf, all kinds of spirituous, etc., liquors, and to pledge the credit of the State Dispensary for the payment for the same.

It then alleges that by an Act entitled "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its affairs," approved the 16th of February, 1907, the State Dispensary Commission was created. This Act is set out in full in the Bill. That within a short time thereafter the commission provided for was appointed and the defendants qualified and organized, pursuant to the Act, as the State Dispensary Commission.

That upon their qualification and organization the defendants entered upon the discharge of their duties; took possession and control of the entire business and property of the State Dispensary; sold the property and collected the debts due to the State Dispensary, and the proceeds arising from the sales and collections are in the hands of the defendants, applicable to the payment of the liabilities of the State Dispensary, and to the other uses and purposes designated in the Act. It alleges certain negotiations referred to, which it is not necessary to set out, between the State Dispensary Commission and itself, whereby the amount of its claim was admitted to be true and owing. It alleges that the Commission had collected and received from the sale of the property of the State Dispensary, and had in hand upwards of $800,000; that the debts due by the State Dispensary did not exceed the sum of $600,000, and charges that the fund so in the hands of the State Dispensary Commission is held for the specific purpose of paying all the just liabilities of the State Dispensary, and constitutes a trust fund in the hands of the defendants for it and the other creditors of the State Dispensary, and that the amount due to it had been agreed upon, and that it is entitled to have the said amount immediately paid to it out of the said fund. The bill then proceeds to allege that the defendants (the State Dispensary Commission) are abusing the trust reposed in them by wrongfully and unlawfully failing to carry out the terms of the Act of 1907, and that the greater part of the money which they had received has been on deposit for many months, and was then on deposit, with certain banks of the State of South Carolina, in which banks the

defendants, or some of them, are interested as officers or stockholders, and that the defendants have wrongfully, unlawfully and fraudulently refused and declined to make distribution of the money among the creditors of the State Dispensary, or to pay the claims of the complainant or any of the other creditors, for the reason that there had been formed, and then existed, an unlawful understanding and agreement between the defendants by which it had been decided that the money deposited in the banks above mentioned be allowed to remain as long as possible in the said banks to use for their benefit and profit. It further alleged that there were a large number of persons claiming to be creditors of the State Dispensary and seeking to collect from the defendants the various sums due them, and that suits had already been brought against the defendants, and others were threatening to institute similar action, and alleged that if the defendants should be required or permitted to defend the multiplicity of suits in order to determine the validity of each claim against them, and should be allowed, as they have declared their intention to do, to defer payment of all claims until a final determination of the said suits, a large part of the fund in their hands would be wasted in expensive litigation and court costs, and great wrong, injury and injustice would be done to the complainant and other creditors whose claims are admitted to be just, and about which there is and can be no dispute.

It then alleged that although the said Commission had a large sum of money in their hands, and though they were wrongfully retaining the same for the use and benefit of the banks above mentioned, yet they had only given bond in the sum of ten thousand dollars each, and were at the time threatening to take measures to have an Act passed by the General Assembly of the State of South Carolina terminating their commission and providing for a transfer of the money from their hands to the State Treasurer, which money ought to be applied to the payment of the debts due the complainant and other creditors of the State Dispensary, and thus placing the same beyond the reach of, or by some other means impairing the contract rights of, the complainant and the said other creditors, and that unless they are restrained and enjoined from exercising any control over or in any way interfering further with said fund, the defendants would waste or

wrongfully divert the same to the great and irreparable injury of the complainant and all other creditors of the State Dispensary.

It then alleged a dissension in the Commission on the part of the defendant Arthur, and that he had declined and refused to take any further part in the proceedings therein, and that on account of the dissension the complainant believed that it was impossible for the Commission to agree upon any plan for carrying out the provisions of the Act of 1907, or to execute the trust imposed upon them by the said Act, and that unless the Court should take charge of the trust fund now in the hands of the defendants, as members of the said Commission, and administer the same in accordance with the provisions of the said Act of 1907, the complainant and other creditors of the State Dispensary would, to their great and irreparable damage, be indefinitely delayed in the collection of their claims.

The bill further charged that the defendants alleged and pretended that there were certain irregularities and fraud in connection with some of the sales of liquors made to the former officers of the State Dispensary, and that the defendants had entered into an unlawful combination or conspiracy with the Attorney-General of the State of South Carolina, under whose advice the defendants were acting, to aid the said Attorney-General in carrying out his frequent threats to prosecute and imprison the said officers, and to that end had agreed among themselves and with the said Attorney-General to withhold payment of the claim of the complainant and other creditors until the Attorney-General had obtained such evidence as might be sufficient to prove the guilt and secure the conviction of the said officers, and that under and pursuant to this agreement, combination or conspiracy, the defendants had refused and were still refusing to carry out the provisions of the said Act of 1907 and to pay the claim of the complainant and other creditors of the State Dispensary, although the account of the complainant had been duly audited, the amount of the claim admitted to be justly due and payable, and notwithstanding the defendants had never made any pretense or claim that any of the sales made by the complainant was in any sense irregular, illegal or fraudulent, and notwithstanding the frequent promises and agreements of the defendants to pay the amount so admitted to be due.

It further alleged that the defendants had never claimed or pretended that the amount due the complainant was subject to any offset, credits or counter-claims, and that the complainant was ready, able and willing, if the Court should direct that the amount due it should be immediately paid, to execute and deliver to the defendants a good and sufficient bond conditioned to pay the defendants all such amounts as might be, upon a hearing of the case, found and adjudged to be due by the complainant to the defendants by way of offset, reduction, credit, counter-claim or otherwise.

The prayer of the bill was that the Court would forthwith appoint a receiver to take charge of and administer as a trust fund all of the money in the hands of the defendants arising out of the sale of the property belonging to the State Dispensary of South Carolina, or from the collection of debts due to it; or direct and decree that the amount admitted to be due the complainant be immediately paid to it upon the execution by it of a good and sufficient bond, to be approved by the Court, and conditioned to pay the defendants all such sum or sums as should be found to be due them by the complainant and adjudged to be paid by it.

That the defendants, their agents, servants, attorneys and employees should be restrained and enjoined from disposing of or paying out, or in any manner interfering further with the fund or any part thereof; and that it be referred to a master to ascertain and determine the amount due the complainant for goods sold and delivered by it to the State Dispensary, and that a decree be entered ordering and directing that the amount so found to be due be immediately paid to the complainant, and that the defendants be required to set forth an account, etc. (Record, 17-27).

The amended and supplemental bill of complaint of the Wilson Distilling Company, (Record, 105-119), in substance is very much like the bill of the Fleischmann Company. It sets out in full the Act of 1907, the organization of the Commission and their entry upon the duties of their office, the sale of the State Dispensary property, except the real estate (which was not included in the Act, and was a very large and important asset of the State, bought with funds arising from the business and held by it as a part of

the State Dispensary); the collection of the debts due the State Dispensary; the deposit of the funds in certain banks of the State, national and State; and that the amount which it had received from such sales and collections, together with the sum received from the State Treasury, amounted to about $800,000, and that such sum of money was applicable to the payment of the just liabilities of the State Dispensary and to other purposes designated in the Act.

It then set out that the complainants had, prior to the passage of the Act of 1907, sold, at prices which were reasonable and mutually satisfactory, large quantities of alcoholic liquors, and that the State was due to them the specific amounts set out in the several paragraphs of the bill. All of them, however, being mere debts upon a simple contract of purchase and sale. It alleged that the money received by the defendants and held by them was placed in their possession for the specific purpose of paying the just liabilities of the State Dispensary, and became, and now constitute, a trust fund in the hands of the defendants, and that defendants held the same as trustees for the complainants and the other creditors of the State Dispensary, and that they became and were charged with the ministerial duty of paying all of the said just liabilities of the State Dispensary to the complainants and other firms, corporations and associations respectively entitled thereto; that the said sum of money, if properly preserved and applied, would be amply sufficient to pay off the claims of the complainants and all other just liabilities of the State Dispensary, which said liabilities did not exceed the sum of $609,000.

The bill then proceeds to charge that the defendants constituting the State Dispensary Commission had abused, and were abusing, the trust reposed in them, to-wit:

(a) By wrongfully and unlawfully failing and refusing to pay the just claims of the complainants and other persons, firms and corporations having just claims against the State Dispensary at the earliest practicable moment, as required by the Act of 1907.

(b) By unlawfully, and for the wrongful purpose of avoiding, delaying and defeating the payment of the just liabilities of the said State Dispensary, denying their trust and that they owed any duty to the creditors of the State Dispensary.

(c) By wrongfully and unlawfully exceeding the powers conferred upon them by law, and by usurping and presuming to exercise the powers of a Court, and unlawfully attempting to arrogate to themselves exclusive jurisdiction of all claims against the said State Dispensary and against the funds in their hands.

(d) That they had exercised their powers and functions in a partial, unfair and oppressive manner, and the hearings and proceedings had by them upon the claims of persons, firms and corporations who allege themselves to be creditors of the State Dispensary had not been designed to ascertain the just liabilities of the said State Dispensary, but were for the purpose of providing some more or less plausible excuse for refusing to pay the liabilities of said State Dispensary and for the procurement of evidence to be used by the Attorney-General of the State in his proposed criminal prosecution of Dispensary "grafters," and in furtherance of this latter design they had wrongfully required the attendance of non-resident persons as witnesses upon claims against said fund with the sole or principal object of enabling the Attorney-General to have criminal process executed against the said persons while within the jurisdiction of the State in obedience to said requirement, and at the same time had wrongfully refused to pass upon or allow such claims without the personal presence of such non-resident persons at their hearings.

(e) That they are wrongfully seeking, or that they wrongfully acquiesce in other persons seeking for them, an amendment to the Act of 1907, having for its purpose the legalizing of their usurpations of the powers and functions of a Court, and their wrongful claim of exclusive original jurisdiction, as such Court, of all claims against said Dispensary and against the funds in their hands.

(f) That they wrongfully seek, through the proposed legislation, to place the said funds beyond the reach of this Court, and every other regularly organized Court of general jurisdiction, and thereby render it impossible for the complainants and other persons having just claims against the State Dispensary and against the said funds to realize anything upon their claims, through any legal proceedings, or otherwise, except such amounts as the defendants may be pleased to allow them.

(g) That they deny the right of the complainants and other persons having just claims against the said Dispensary and against the fund to have their claims litigated in a Court of general jurisdiction, and are attempting, through the proposed legislation, to make such denial effectual.

The bill further charges that the defendants, by their conduct and usurpations, and through the proposed legislation, seek to deny to the complainants and other persons having just claims against the Dispensary, the right of trial by jury guaranteed by the Constitution of the State of South Carolina; and that they seek to deprive them and all other persons holding just claims against the State Dispensary and against the fund, of their property without due process of law, and to deny to them the equal protection of the laws, in violation of their rights under the Constitution of the United States.

The bill further alleged that suits were threatened against the defendants by persons claiming to be creditors of the State Dispensary, and that if defendants were permitted to defend a multiplicity of such suits in order to determine the validity of each claim against them, and were allowed to defer payment of all claims until the final determination of such suits, a large part of the fund in their hands would be wasted in expensive litigation and Court costs, to the great injury and damage of complainants and all others having just claims against the Dispensary.

The prayer of the bill is that a receiver be forthwith appointed to take charge of and administer as a trust fund all the money in the hands of the defendants arising out of the sale of the property belonging to the State Dispensary and from the collection of the debts due it; for an injunction against the defendants restraining them from disposing of or paying out, or in any manner interfering further with the fund or any part thereof, except to transfer it to the receiver appointed by the Court, and that it be referred to a Master to ascertain and determine the amounts due to the complainants and other creditors upon their claims against the State Dispensary and against the said fund in the hands of the defendants, and that a decree be entered ordering and directing the amounts so found to be due to be immediately paid to the complainants respectively, etc. (Record, pp. 105-119).

It will thus be seen that in both bills the complainants seek to have the Court to inquire, ascertain and determine the amounts which may be due by the State of South Carolina on the said purchases and sales of liquors to the complainants, and to adjudge and decree the same against the State as a just liability.

The return and answer of the State Dispensary Commission to the original Bill of Complaint brought by the Distilling Company was filed, but it need not be further referred to, as the State Dispensary Commission, upon the rule to show cause, which was issued under the amended and supplemental bill, reiterates what is contained therein and answers in full such amended and supplemental bill.

The return to the rule to show cause and to the Bill of Complaint in the Fleischmann case, (Record, 41), of Murray, McSween, Arthur, Henderson and Patton, constituting the State Dispensary Commission of South Carolina, and as individuals, without submitting themselves to the jurisdiction of the Court, but objecting thereto, averred that the complainant had not by and in its Bill stated a cause which entitled it to any such relief as was sought or prayed for against the defendants or any of them. They next averred that the suit so instituted was in fact and in legal effect a suit against the State of South Carolina and not against them or any of them, except as in their official capacity they represent the State, and, therefore, the Court had no jurisdiction by reason of the provisions of the Eleventh Amendment to the Constitution of the United States. Further, that the purpose and intention of the suit was to administer the funds belonging to the State and in the custody of its agents, to coerce it into the payment of the alleged debt of the complainant, and to restrain a duly constituted Court of the State in violation of Section 720, Revised Statutes.

The return then proceeded to answer in full and in detail all of the allegations contained in the Bill of Complaint. It is impossible to summarize in a brief space this return and the statements made therein concerning the organization of the State Dispensary Commission, the proceedings before it and the complainants' relations to the State Dispensary. We can only refer to the Record for this statement (Record, pp. 41-51).

The defendants, Murray, McSween, Arthur, Henderson and Patton, on March 7, 1908, made return to the rule to show cause issued upon the amended and supplemental Bill of Complaint of the *Wilson Distilling Company vs. W. J. Murray et al.*, why the relief prayed for in the bill should not be granted, and why a receiver should not be appointed and an injunction issued as prayed for, reserving objection to, and not submitting themselves to, the jurisdiction of the Court, but insisting that it was without jurisdiction in the premises, etc., (Record, 177). They objected:

(1) That the complainants in and by their bill had not stated a cause which entitled them to the relief prayed for;

(2) That the suit is, on the face of the bill, in effect, a suit against the State of South Carolina, seeking as it does to coerce the said State, through its officers, in the payment of alleged claims against it; to substitute this Court in place of its officers in the exercise of the authority, discretion and jurisdiction conferred upon them by a statute of the State, and to usurp the functions of the Commission; to take the funds of the said State out of the hands of its officers and place them in the hands of a receiver of the Court; and to enjoin and restrain the defendants, as officers of the State, from paying over or disposing of the funds of the State, as it had directed or may hereafter direct.

(3) That it appears upon the face of the bill and from the allegations therein contained, that the State was an indispensable party to the suit, but had not been made a party on the record, and can not be made a party without its consent, which consent had never been given.

The Commission further made return denying in substance every allegation of the bill which showed or tended to show any irregularity, improper conduct in the administration of their trust, or any abuse whatsoever of said trust, or of the rights of any person claiming to hold or to have a just liability against the State for or on account of whiskies and liquors sold to it in the conduct of the business of the said State.

The respondents, further answering, alleged that the State Dispensary, as it had existed prior to the Act creating the said Commission, had no existence or entity or credit separate and apart from the State, of which it was a mere agency for the conduct and operation of the particular business, and that all purchases

were made by the State and upon her credit. It admitted the purchases from complainants alleged in the complaint, but averred that such attempted sales were not made in accordance with the law and were in violation of the Statutes of the State of South Carolina and in pursuance of a conspiracy between complainants and officers of the State to cheat and defraud the State in the manner set forth in the return, and denied that the funds held by them were held as trust funds or were applicable to the payment of the alleged claims of the complainants except so far as said claims, upon investigation by said Commission, may be adjudged by said Commission to be just and valid claims against the State, in whole or in part. These returns were accompanied by affidavits and other papers in support thereof.

The return further set out that the General Assembly of the State of South Carolina had, on the 24th day of February, 1908, amended the Act creating the Commission, which said Act is hereafter referred to, and whereby it was declared that the said Commission possessed full power to pass upon, fix and determine all claims against the State growing out of dealings with the State Dispensary, and prohibiting any funds held by said Commission from being paid out for any purpose or to any person whatsoever except upon the check of the chairman of said Commission countersigned by the Treasurer of the State of South Carolina, and that the Treasurer of the State of South Carolina should countersign only such checks as may be presented by the chairman of said Commission upon presentation of the same, with the certificate of said Commission showing that it is for the payment of a claim of a creditor which has been adjudged by said Commission to be due, and upon such adjudication ordered to be paid, etc.

Upon the hearing upon these rules to show cause why a receiver should not be appointed, the Court consolidated the two causes and passed an order granting the injunction until the final determination of the suit or the further orders of the Court, and appointing receivers and directing them to take charge of and administer all and singular the money, funds, property, rights, credits and assets involved in the case, and theretofore enjoined from being disposed of, especially all the money then in the hands of the defendants arising from the sale of the property belonging to or in connection with the sale of the said State Dispensary,

or from the collection of the debts due to it, or the moneys deposited to the credit of the defendants composing the State Dispensary Commission in the various banks and depositaries, and the defendants and each of them were required and commanded to pay over and deliver to the said receivers, on demand made on them, all of said moneys, funds, etc., which the defendants constituting the said State Dispensary Commission now have in their possession or under their control by virtue of the Act of the General Assembly of the State of South Carolina, passed at its session in 1907, creating the said State Dispensary Commission. All and singular the creditors of the South Carolina State Dispensary were restrained and enjoined from prosecuting any suit or proceedings for the collection or enforcement of their claims against the defendants except by leave of the Court first had and obtained. (Record, p. 190.)

Thereafter, on the 26th day of March, 1908, Judge Pritchard allowed the complainants to amend their bill, which said amendment to the bill was made and filed on the 27th day of March, 1908. This amendment, however, only averred that the Act of 1907 created a trust for the specific purpose of paying off all the just liabilities of the State Dispensary; that the defendants constituting the State Dispensary Commission duly accepted such trust as trustees, and that the complainants and other creditors of the State dispensary duly accepted the benefits of the said trust as *cestui que trust*, and that by such acceptance a valid, binding and irrepealable contract within the meaning and protection of the Constitution of the United States, and of Art. I, Sec. 10 thereof, was created; and, further, that the Act of 1908, amending the Act of 1907, was unconstitutional, null and void, as impairing or tending to impair the obligation of the contract hereinabove mentioned, and an attempt to deprive the complainants of their property without due process of law, etc. This amended bill contains averments with regard to the institution of the mandamus proceedings before the Supreme Court of the State of South Carolina, which averments and allegations we conceive are of such indifferent character as not to merit comment.

The State Dispensary Commission petitioned for the allowance of an appeal to the Circuit Court of Appeals from the interlocutory orders denying the temporary restraining order and grant-

ing the injunction *pendente lite* and appointing receivers, which was duly granted, (Record, 311); and filed six assignments of error (Record, 314). These assignments of error were presented and argued before the Court under the following heads:

(1) Because upon the face of the bills the Court had no jurisdiction or authority to pass any orders therein;

(2) Because the suits were in effect suits against the State of South Carolina, and as such State had not consented to be sued, the Court was without jurisdiction;

(3) Because the State of South Carolina, as appears on the face of the bills and the proceedings had, is an indispensable party, but as the State has not consented to be sued it can not be made a party to the suits. The Court is therefore without jurisdiction.

The appeal was heard in the Circuit Court of Appeals for the Fourth Circuit on May 26, 1908, (May term, 1908), (Record, 330). Afterwards, on September 15, 1908, the Court announced and filed its opinion affirming the decree of the Circuit Court for the District of South Carolina, and remanding the case to be further proceeded with, in accordance with the views expressed in the opinion (Record, 331).

A petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit was filed and presented in this Court, and the same was granted on the 8th of December, 1908, and the record was certified by the Circuit Court of Appeals to this Court on the 22d day of December, 1908, (Record, 378).

SPECIFICATIONS OF ERRORS IN THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The petition for a writ of certiorari submitted that the Opinion of the Circuit Court of Appeals affirming the order of the Circuit Court granting injunction and appointing receivers was erroneous:

1. In holding that the suits were not suits against the State in violation of the provisions of the Eleventh Amendment to the Constitution.

2. In holding that the State was not a necessary and an indispensable party to said suits.

3. In holding that the Circuit Court had jurisdiction of said causes.

4. In holding that the Act of February 16, 1907, created an irrevocable trust which could be enforced and executed by said Circuit Court.

5. In not holding that there was no equity in said bills, and no cause or necessity shown for the grant of an injunction or the appointment of receivers.

6. In not reversing the order and decree granting an injunction and appointing receivers.

7. In not directing a dismissal of the bills and each of them.

We propose, however, to treat these assignments of error as presenting only three questions:

(1) Whether the suits are suits against the State;

(2) Whether the Act of 1907 created a trust and divested the State of all control or disposal of the State Dispensary property;

(3) Whether the State is an indispensable party to such suits in such sense that the Court could not proceed to judgment without materially affecting its rights and interests in the fund.

BRIEF OF ARGUMENT.

(1) *Whether the suits are suits against the State.*

The Circuit Court of Appeals reached its conclusion that these suits were not suits against the State by the following course of reasoning:

"The State, through its Legislature, has passed both the title and possession of the fund involved to the Commission for the purposes designated in the Act, the first of which is to pay all outstanding just liabilities which had been incurred by the State Dispensary in the course of its operations. The fund being in the hands of the Commission charged with this duty, the State has no interest in so much thereof as is necessary to pay the just debts; then, how can it infringe any right of the State to have the true amount of the debts due by the defunct Dispensary judicially ascertained? . . ." (Record, 361.)

"We are constrained to hold that the fund in their hands is, by virtue of the provisions of the Act, held in trust for the payment of the debts mentioned, and that the creditors of the State Dis-

pensary have a property in the fund in the hands of the Commission, to the extent that the debts are shown to be just, and that a judicial termination of the true amount of such debts can, in no way, affect the rights or interests of the State, the only interest of the State in the fund being, as declared by the Act, the residue after the just liabilities of the State Dispensary are paid, and this interest is subordinate to the payment of the said liabilities. It is elementary that particular formality is not required in the creation of a trust. Any agreement or contract in writing, executed by one having the power to dispose of property, whereby it is directed that particular property or fund shall be held or dealt with for a special purpose for the benefit of another, in such case equity raises a trust in favor of the beneficiary. The right to create a trust for specific purposes is not confined to individuals or private parties, but we find in Perry on Trusts, Sec. 30, 'that a State, by its legislation, or by its public officers, duly authorized, can create a trust, convey property and appoint trustees.' The provisions of the Act creating the Dispensary Commission are strikingly similar in substance to the usual form of conveyances of property in trust for the benefit of creditors. There are the necessary three parties, the trustor, the trustees, and the *cestui que trusts*. The State, acting through the legislature, passes the title and possession of certain property to the five appellants who are constituted a Dispensary Commission. The direction is that the appellants take this property, sell it, collect debts and, when the proceeds are in hand, pay off the just liabilities of the State Dispensary. The Act then provides for the payment of certain expenses incident to the discharge of the duties devolving upon the Commission, and after that, the residue to be paid to the State. We undertake to say that there is scarcely to be found recorded anywhere an assignment by a debtor for the benefit of creditors more intelligently constructed or more readily understood. Having, therefore, determined the relation of the appellants to the fund in controversy, we answer the question propounded in the outset that THIS IS NOT A SUIT AGAINST THE STATE and THAT COMPLAINANT IS NOT FORBIDDEN TO MAINTAIN HIS ACTION BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. The appellants are in possession of the fund which complainant is seeking to recover on the ground that

it has been set apart and placed in the hands of the appellants to pay a debt which is justly due him. The State of South Carolina does not intervene to assert any right to this fund or to have any interest which the State may have in it determined, but the appellants themselves raise the question of the jurisdiction of the Court, basing it upon the allegation that the property in their hands belongs to the State. We think, in view of the facts in this case, upon the authorities heretofore cited, and especially under the case of *Tyndal vs. Wesley, supra*, the appellants are not entitled to avail themselves of that defense." (Record, 366-368).

Upon this question we do not consider it necessary to go further back than the provisions of the Constitution of South Carolina of 1895, and the Acts made in pursuance thereof. The Constitution of 1895 created and authorized the operation of a State Dispensary as a part of its governmental machinery. The clauses of the Constitution referring to this are Article 8, Section 11, and Article 11, Section 12, (see Act in Appendix). The Constitution of 1895 went into effect from and after the 31st day of December, 1895. In pursuance of such Constitution, the first Act of the Legislature was an Act, approved March 6, 1896, (22 Stats., 123). All other Acts relating to or amending this Act were made subject to and derive their authority from the sections of the Constitutions above named. With some changes from time to time, this law continued until February 16, 1907, when, by Section 47 of the Act, approved on that date, and which went into effect thereupon, the State Dispensary was abolished, and the regulation and sale of alcoholic liquors and beverages within the State was devolved upon the several counties through County Dispensary Boards (25 Stats., 463).

"Section 47. The State Dispensary is hereby abolished, and all Acts or parts of Acts inconsistent with this Act are hereby repealed: *Provided*, That this Act shall not have the effect of preventing any violations of the present criminal law relating to the Dispensary being punished as now provided by law for offenses heretofore committed."

The effect of this statute was simply to take the power of purchasing whiskeys and the making of contracts therefor out of the hands of the State Board of Control, which had theretofore been elected by the Legislature, and to devolve the authority,

under Section 11, of Article 8, of the Constitution, upon county officers and not upon State officers. (Section 6 of the Act of 16th February, 1907; 25 Stats., 468). That section is as follows:

"Section 6. The members of the said County Dispensary Board are hereby declared to be county officers, and are hereby authorized and empowered, under the authority and in the name of this State, to buy in any market and retail within the State liquors and beverages, as provided herein: *Provided*, That the State shall not be liable upon any contract for the purchase thereof beyond the actual assets of the Dispensary for which the purchase is made. The members of the County Dispensary Board and all Dispensaries shall be persons of known moral character and not directly or indirectly applicants for appointment."

It is, therefore, too broad an assertion to say that the State of South Carolina has gone out of the whiskey business. It has simply distributed the power of purchasing, and the sale of, whiskey to the counties of the State or to county officers of the State, and not to the State officers, while the purchases are still expressly made in the name of the State and under its authority, thereby expressing, as we submit, the intention of the Legislature never to change the relation between the State and that of the vendors of whiskeys from that of debtor and creditor, the relation which existed at the time the Act creating the Commission was passed. The sale of whiskey in South Carolina is still a departmental branch of its government, as construed by its Courts, and on account of such purchases the State is still the debtor to the vendor, and no action can be brought against the State on account of its immunity, nor against the County Boards because they represent the State.

It is apprehended that the learned Circuit Court of Appeals in its opinion has laid too much stress upon the point that the State Dispensary has been abolished, and that thereby the intention can be derived that it has abandoned its former policy of still keeping up the business through a State agency, and that, in so retiring from the business, it was the intention to declare a trust upon the property it held in connection with the State Dis-

pensary in favor of the parties with whom the State had been dealing, honestly or dishonestly, (Record, 361).

In view, therefore, of the Constitution and Statutes of the State, it is clear that, at the time the State Dispensary was abolished, on the 16th of February, 1907, the relation existing between the State and the alleged vendors of alcoholic liquors was that of debtor and creditor, and that the State Dispensary Board was simply the agent through whom the alleged contracts were made, being, as declared both by the Statutes and by the decisions of the Courts of the State construing such Statutes, officers of the State.

State vs. Farnum, 73 S. C., 165.

The relation of creditor and debtor existing between the vendors and the State on contracts made by State agents under statutory authority, what effect and result has been brought about by the Act of February 16, 1907, providing for the disposition of all the property connected with the State Dispensary, and to wind up its affairs? 25 Stats., 835.

The petitioners contend that the relation of creditor and debtor existing between the vendors and the State was not changed, and that by such Act a Commission was created to investigate, to determine and to declare what was the true indebtedness of the State to such alleged creditors on account of the purchases of alcoholic liquors, and upon such ascertainment to pay the amount so ascertained and determined by them; that, inasmuch as the Legislature had been for two years investigating the alleged fraudulent purchases and sales of whiskey made to and with its officers, the State Dispensary Board, and inasmuch as it had been satisfied that the present Board had been guilty of fraudulent and illegal conduct, and the Governor had, upon its suggestions, removed the Board of Control (*State, ex rel., vs. Ansel, Governor*, 76 S. C., 395; *Ex parte Parker*, 74 S. C., 466), it desired to create and did create by this Act, a Commission to continue the labors and work of former legislative committees, and to discharge the duties of the investigating committee then existing, and clothed such Commission so created with all of the powers held by and conferred upon such committees, with the additional power heretofore mentioned of determining, ascertaining and paying

the debts found to be true and just liabilities. It did not propose to relinquish control over the question of these claims, and expressly required reports to be made to the Governor, who, it is apprehended, had the power to direct and to require its law officers, in the name of the State, to sue for the moneys illegally obtained by the parties dealing with the Dispensary Board. Hence the investigation which the Commission was to carry on was not confined to purchases made for which claims were to be presented, but it was to proceed with the work of investigating into prior purchases and into the alleged fraudulent conduct of State officers.

This is plainly seen when reference is made to the sixth section of the Act, wherein the State Dispensary Board was abolished, and in which it is declared that such prior offenses could still be prosecuted and the offenders punished, and the laws requiring the prosecution of offenses against the Dispensary law by the Attorney-General of the State.

From all which it is submitted that the Legislature, by such Act, did not intend to make an absolute assignment of this particular property for the benefit, either specially or generally, of the alleged creditors, who should be paid simply upon presentation of their claims,, and whose claims should simply coincide with the items and amounts upon the books of the State Dispensary Board, with whom it was charged they had had fraudulent dealings, on account of which they had been removed from their offices by the Governor of the State.

The General Assembly of South Carolina certainly does not take any such view of the Act, and the construction that the Legislature has placed upon the Act is that the Legislature had not surrendered control of or parted with the title to the Dispensary property or the funds or proceeds arising from the sale of such property; for the very next Legislature amended the Act. This amendment not only provided for the payment of the members of the Commission in the performance of their future duties under the Act, but also assumed control and direction of the fund. Act approved 24th of February, 1908, which is printed in the Appendix to this Brief.

The petitioners, the State Dispensary Commission, therefore insist that the view entertained by the Circuit Court of Appeals that this Act (1907) was similar in substance to the usual form

of conveyance of property in trust for the benefit of creditors, and that the State, acting through the Legislature, passed the absolute title and possession of the property to the Dispensary Commission, is erroneous. On the contrary, they believe that the proper view is that the Legislature, in accordance with the power given it under Article 17, Section 2, whereby it is authorized to direct by law "in what manner claims against the State may be established and adjusted," created a tribunal to investigate the *bona fides* and legality of these claims, and to determine the just liability of the State to these alleged creditors, clothing it with adequate and sufficient judicial power to have such investigation and to carry out the duties devolved upon it.

Such commissions and tribunals are not unusual in South Carolina, nor in other States, or even with the Federal government. They may not be Courts in the sense of the Federal Constitution and statutes, nor in the sense of the State Constitution and its statutes. Nor, while it was made an assignment of error, was it insisted upon in argument before the Circuit Court of Appeals that it was under the Act of 1907 a court, but that it was such under the amendatory Act of 1908.

The Commission, as individuals, have no interest in the fund. They are mere agents holding a fund, with the power, after they shall have determined what is a just liability, to pay the same over out of the fund. The assets are still the assets of the State. Being officers of the State, with the funds of the State in their possession belonging to the State, and these suits being brought by alleged creditors of the State, the State is the real party in interest, and the suit is virtually against the State.

Opinion Supreme Court of South Carolina, Record, 280, *et seq.*;
McHose vs. Dutton, 55 Iowa, 728;
Brown University case, 56 Fed., 55;
Yale College case, 52 Fed., 177;
Lowery vs. Thompson, 25 S. C., 416;
Board, etc., vs. Gantt, 76 Va., 455;
Louisiana vs. Jumel, 107 U. S., 711.

In *Hagood vs. Southern*, 177 U. S., 52, where bills were brought in the Circuit Court of the United States, the Court said:

"The suits are accurately described as bills for the specific performance of the contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such if it chooses; and except with that consent it could not be brought before the Court and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contracts by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that 'the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' "

Further, the Court said:

"If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be."

We do not consider that it would be useful to undertake to discuss the many cases which have been determined by the Supreme Court of the United States, for it seems to us clear that this case can not be classified with those cases which are brought in a court of equity or by mandamus to require officers to perform

a plain official duty, the position in which the Circuit Court appears to maintain that this case falls. There is no claim made, and none can be made, that the Act of 1907 is unconstitutional, either impairing their original contract right or depriving them of property without due process of law. The State Dispensary Commission are not defending any case of trespass or of wrongs they may have committed towards the persons or property of the complainants under an unconstitutional statute; nor are they affirmatively, through and by means of an unconstitutional statute, injuring the complainants or invading any of their property rights; nor are they attempting to enforce an unconstitutional statute. Consequently, this case does not fall within any class of cases mentioned by the learned Circuit Court of Appeals, nor is it similar to any of the cases cited by the learned Court. These suits fall into that class of cases where the action of the Court will have the effect of depriving the State of funds or property in its possession, which class of cases comes into conflict with the Eleventh Amendment.

Louisiana vs. Jumel, 107 U. S., 711;
Farmers National Bank vs. Jones, 105 Fed., 459;
Christian vs Atlantic, etc., R. Co., 133 U. S., 233;
Brown University vs. R. I. College, 56 Fed., 55;
Lowery vs. Commissioners of Sinking Fund, 25 S. C., 416;
Board of Public Works vs. Gantt, 76 Va., 455.

It is respectfully submitted that the cases referred to by the Circuit Court of Appeals are not analogous, and the judgments rendered in those cases upon the actual facts involved are not applicable to these suits. If, however, it be admitted that the State of South Carolina passed all title and control over the fund in question, then it must be admitted that these suits against the officers are not suits against the State, as contrary to the Eleventh Amendment, and the citations by the Court are unnecessary. But if title, possession and control have not passed from the State, and the Commission is a mere agency of the State, and by virtue of their office holding funds directly belonging to the State, then certainly there is nothing in the cases cited by the learned Court

which tends at all to sustain the conclusion reached by the Court that these suits are not substantially against the State.

In our view, this Court has invariably declared that, if the relief or the remedy sought against officers of the State or persons claiming to act in behalf of the State, will affect the property rights or the funds of the State, or compel it to pay its debts, or require the specific performance of a contract by the State, the State is necessarily and substantially a party to the suit, or that it is a necessary and indispensable party, and that, as it can not be sued in a Federal Court for want of jurisdiction over the State, the suit must be dismissed.

But if the suit is to enjoin the enforcement of an unconstitutional statute, by officers of the State, it will be presumed that the State has not authorized the wrong, and that the defense by such officers that they are acting under a State statute is insufficient, because no one should be permitted to assert a claimed right which violates the Constitution of the United States.

It is, therefore, submitted that the State Dispensary Commission is a mere agency of the State, holding its funds subject to its control and direction, and that suits against such Commission to deprive it of such possession and control and to apply the proceeds to the payment of alleged debts of the State, to be ascertained in a Federal Court, or in any other Court, or before any other tribunal not designated by the State, and contrary to the manner and form prescribed by its own statute, is in substance a suit against the State and is contrary to its immunity against suit, either in the Federal Court or in its own Court.

(2) *Whether the Act of* 1907 *created a trust and divested the State of all control or disposal of the State Dispensary property.*

The Circuit Court of Appeals held that the State, through its Legislature, had passed the title and possession of the fund involved to the Commission for the purposes designated in the Act,

the first of which was to pay all outstanding just liabilities which had been incurred by the State Dispensary in the course of its operations, and that the fund being in the hands of the Commission charged with this duty, the State has no interest in so much thereof as is necessary to pay the just debts, and that no right of the State could be infringed to have the true amount of the debts due by the defunct Dispensary judicially ascertained by the Court in these suits, (Record, 361); that the fund in the hands of the Commission is, by virtue of the provisions of the Act, held in trust for the payment of the debts mentioned, and that the creditors of the State Dispensary have a property in the funds in the hands of the Commission to the extent that the debts are shown to be just, and that a judicial determination of the true amount of such debts can in no way affect the rights and interests of the State, the only interests of the State in the fund being, as declared in the Act, the residue after the just liabilities of the State Dispensary are paid, and this interest is subordinate to the payment of the said liabilities, and that the fund in the hands of the Commission must be treated as a trust fund, (Record, 366-367).

The contention, however, of the petitioners is that the Act of 1907 created a Commission to ascertain what were the just liabilities of the State towards certain persons who had been dealing with one of its institutions, and with officers who had been removed by its Chief Executive on the ground of illegal and improper conduct in creating the very claims to be investigated; that under the conditions existing it never was the intention of the Legislature to create any trust in their favor except such as might result after the Commission had made investigation and had determined their just liabilities; that the Legislature had no authority but to make such law in conformity with the Constitution of 1895, Article 17, Section 2, which reads:

"The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted,"

and that such section was also limited by a former section, Article 3, Section 30, of the Constitution, which declares that

"The General Assembly shall never * * * authorize payment or part payment of any claim under any contract not authorized by law. * * *"

The petitioners claim that the Act of 1907 is nothing but an Act which authorizes claimants to sue or to have their claims established against it, and to be paid out of a certain fund. Allowing such claims to be established and sued on could not be construed as admitting the validity of the claim.

Bank vs. State, 60 S. C., 465.

The Statute books of the State contain instances where the Legislature has seen fit, instead of making the investigation through its own committees, to devolve this duty upon certain persons as commissioners or upon regularly appointed tribunals. But no State decision has ever held that by such Act a contract was created between the State and the claimants, which disabled the Legislature from either modifying or repealing such statute.

Campbell vs. Sanders, 43 S. C., 577.

As an instance of the General Assembly prescribing a special mode of establishing and adjusting claims against the State, see Joint Resolution "providing mode of ascertaining the debt of the State, and of liquidating and settling the same." 16 Stats., 669. By this Joint Resolution a special Court was established with a right of appeal to the Supreme Court of the State, and also of right of appeal by writ of error to the Supreme Court of the United States. One of the provisions of this Joint Resolution required that "all persons holding bonds or coupons of bonds, certificates of stock, or interest orders thereon, issued by this State since the 1st of January, 1866, before they could be entitled to the benefits of the Act, should present the same for examination before the person or persons appointed to examine the debts, liabilities and unfunded debt of the State, etc."

See, also, the establishment of a Court of Claims by an Act "To provide for the settlement of the unfunded debt of the State incurred before the 1st of November, 1876" (16 Stats., 555). This

Court of Claims was to be held by a Commissioner "for ascertaining all legal and just claims," and by an amendment to this Act the burden of proof was declared to be upon the claimant to establish the *bona fides* of the original consideration upon which the claim was based (16 Stats., 788).

As a further instance, see the Joint Resolution to raise a Commission to investigate the indebtedness of the State (16 Stats., 318). This Act is not dissimilar to that approved on the 24th of January, 1906, and entitled "An Act providing for the investigation of the Dispensary." The several Commissions and Courts of Claims are discussed in the *Bond Debt Cases* (12 S. C., 200), and *Ex parte Childs* (12 S. C., 111).

The Act of 1907 creating the Commission gives no right of appeal nor does it contain the usual features of an Act creating a Court, but the Legislature was under no legal obligation to provide either any form of proceedings or to create a Court with the right of appeal to a Court for the benefit of its debtors. The relation of creditor and debtor existing between the State and the vendor of whiskey, such vendor had only the moral obligation of the State to look to for the fulfillment of its contract. The State certainly had the power, therefore, to prescribe any conditions it saw fit upon which these claims should be presented and paid, or to shield itself behind its immunity entirely against the payment of the debts. But certainly the power of investigation given by the Act was judicial in its nature. No contract was made by the Act of 1907 or intended to be made.

The case of *South Carolina vs. Gaillard*, 101 U. S., 433, we think, is directly in point. The General Assembly of South Carolina passed on June 9, 1877, an Act entitled "An Act to provide for the mode of proving bills of the Bank of the State tendered for taxes and the rules of evidence applicable thereto." While this Act was of force, Trenholm, a holder of certain bills of the Bank of the State, in pursuance of the Act, tendered such bills to the Treasurer of the county in payment of his taxes and contended that by complying with the provisions of the Act so as to allow the bills to be deposited with the Clerk of the Court to abide the

result of the proceeding that might be instituted with regard to them, the State entered into a new contract with him, by which it agreed to accept the bills tendered by him in payment of his taxes if he established their validity in the way provided. The Act was repealed. The Supreme Court of the United States held that this Act of 1877 created no new contract between the State and the taxpayer or bill-holder, but merely provided a new remedy which formed no part of the contract created by the charter of the bank; and that after the Act was repealed a party could not institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated, there being no saving clause as to them.

If the Act of 1907 is nothing more than the creation of a Commission before which the State authorizes its creditors to sue and to have their claims established and adjusted, then it can not amount to a contract irrevocable, and this Court has repeatedly so decided:

Beers vs. Arkansas, 20 How., 527;
Railroad vs. Tennessee, 101 U. S., 337;
Railroad vs. Alabama, 101 U. S., 832;
Hans vs. Louisiana, 134 U. S., 17;
Baltzer vs. North Carolina, 161 U. S., 245;
Ex Parte Alabama, 23 Am. Rep., 567.

In *In re Ayers*, 123 U. S., 507, it is said:

"Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity without any violation of the obligation of its contract in the constitutional sense."

And in *DeSaussure vs. Gaillard*, 127 U. S., 216, it is said:

"It was competent for the State of South Carolina either to grant or withhold the right to bring suits against the officers of the State for the recovery of money alleged to have been illegally exacted and wrongfully paid. If granted, the action is in sub-

stance, though not in name, an action against the State itself, just as an action permitted by the Acts of Congress on the subject against a Collector of Customs for the recovery of duties alleged to have been illegally exacted, and paid under protest, is an action against the United States, though nominally against the Collector. In such cases, as the State may withhold all remedy, it may attach to the remedy it actually gives whatever conditions and limitations it chooses; and its own interpretation and application of its statutes on that subject given by its own judicial tribunals are conclusive upon the parties seeking the benefit of them."

The State by this Act expressly devolves the right and duty upon the Commission to investigate, determine and ascertain the just liabilities against it held by these claimants, and does not authorize suits to be brought against it to establish such liabilities either in its own Courts or in the Federal Courts.

In the late case of *Smith vs. Reeves*, 178 U. S., 436, the Court, in construing a statute of California, held that by such statute the State had not consented to be sued except in its own Courts; that it was competent for the State to couple with its consent to be sued, on account of taxes alleged to have been exacted under illegal assessments made by the State Board, the condition that the suit be brought in one of its own Courts, and that the contention that the State could not restrict its consent to be sued to actions brought in its own Courts was incorrect. See, also, *Chandler vs. Dix*, 194 U. S., 590; *Maurcy vs. Commonwealth*, 92 Va., 310.

The Circuit Judge, as well as the Circuit Court of Appeals, proceeds upon the idea that the alleged creditors had acquired some vested right under the Act of 1907, and that some special trust in their favor had been fixed upon the funds held by the State Dispensary Commission. These parties, it is true, had made out a statement of their claims, and had them presented to and filed with the Commission and a roster had been arranged and a day fixed for the hearing of the respective claims, a distinct understanding being had upon the presentation of their claims that the same would be later investigated in an orderly manner. When

the claims were called they declined, however, to obey the legal orders of the Commission. By the terms of the Act itself, this Commission had all the powers conferred upon the committee appointed to investigate the affairs of the State Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved January 24, 1906, and one of the special powers given by Section 3 of that Act was the authority to require the production of any and all books, papers or other documents or writings which they should deem relevant to any investigation, and to require the persons in possession of said books, papers, etc., to produce the same before the committee; and, by Section 5 of the Act, the Commission had the power to withhold the payment of any claim of any creditor against the State Dispensary which they should deem advisable until the same was duly proven by the production of the books of original entry, and of all documents and correspondence relating to all their transactions with the State Dispensary, and to require any person or persons in possession of said books, documents, papers and correspondence to produce the same before the Commission in person. Yet this express authority was denied by the claimants, and they refused to proceed in the manner prescribed by the very tribunal created by the General Assembly before which they should establish and have their claims adjusted.

Subsequent, however, to the institution of the suit the Legislature, on the 21st of February, 1908, amended the Act of February 16, 1907, which Act is attached to the petition herein, and which it is submitted, creates a court and makes such provisions as entirely destroy any idea of a trust created in favor of the beneficiaries.

If, therefore, the Act of 1907 was not a contract, or of such nature as would prevent the Legislature from modifying or amending such Act as it pleases, then the Act of 1908, which was brought to the attention of the Court, has made such provisions as are absolutely inconsistent with any attempt on the part of any Court, State or Federal, to assume jurisdiction to declare and adjudge the amounts due by the State to the claimants, and to administer the fund, except as therein provided for.

The Supreme Court of the State of South Carolina, on the 14th of March, 1908, and a short while subsequent to the interlocutory order granting injunction and appointing receivers, in the case of the *State, ex rel. Lyon, Attorney-General, vs. The State Dispensary Commission*, held, substantially, that the Act of 1907 creating the State Dispensary and the remedies therein provided for, was a purely voluntary Act on the part of the Legislature of the State, and was subject to be repealed, and the allowance of the remedies therein provided for subject to be recalled at any time at the pleasure of the Legislature and in its discretion; that the State Dispensary was as much a part of the State government and as subject to as full investigation and control as the State Treasury; that the State Dispensary Commission were officers and agents of the State, and that the funds in their hands were the property of the State and held by them as its officers, subject to the control of the Legislature; and the possession of the State Dispensary Commission is the possession of the State. The construction so placed upon the statute by the highest Court of the State, if followed by this Court, would demand that the interlocutory orders made by the Circuit Court and affirmed by the Circuit Court of Appeals be vacated and the Bills of Complaint dismissed.

The rule laid down by this Court by one of its latest decisions is "The highest Court of the State is, except in the matter of contracts, the ultimate tribunal to determine the meaning of its statute."

Batchel vs. Wilson, 204 U. S., 36.

We believe it sufficient to say, without a compilation of a vast number of citations, that the Federal Courts will follow, in this case, the decision of the Supreme Court of the State of South Carolina construing the Act of 1907, unless this Court shall take the view that the Act of 1907 created a contract with the claimants, creditors of the State, which the State can not, by subsequent legislation, interfere with.

Elmendorf vs. Taylor, 10 Wheat., 150;
Jefferson Branch Bank vs. Skelly, 1 Black, 436;
McCullough vs. Virginia, 172 U. S., 102;

Mobile Trans. Co. vs. Mobile, 187 U. S., 480;
Jack vs. Kansas, 199 U. S., 372;
Bacon vs. Texas, 163 U. S., 207;
Louisville Trust Co. vs. Cincinnati, 76 Fed., 296;
DeSaussure vs. Gaillard, 127 U. S., 216;
Lewis' Sutherland Stat. Constr., par. 313.

Where the Federal Courts are not by rule bound to follow the decisions of the State Courts in cases falling within the exception, they will consider such decisions upon the point in question and will incline to an agreement with the State Courts.

Mead vs. Portland, 200 U. S., 163;
Blair vs. City of Chicago, 201 U. S., 400;
Copper Mining Company vs. Territorial Board, etc., 206 U. S., 474;
Theological Seminary vs. Illinois, 188 U. S., 662;
Tampa Waterworks vs. Tampa, 199 U. S., 241;
Douglas vs. Kentucky, 168 U. S., 502.

(3) *Whether the State is an indispensable party to such suits in such sense that the Court could not proceed to judgment without materially affecting its rights and interests in the fund.*

The Circuit Court of Appeals held: "This suit is not against the State, nor is the State an indispensable party. Treating the funds in the hands of the appellants as a trust fund, and the duties of the trustees in regard thereto being clearly defined, the trustor is not even a necessary party to the suit brought to compel the trustees to discharge their said duties," etc. (Record, 368).

Assuming the construction of the Circuit Court of Appeals to be correct, that the legal title, possession and control of the property had passed to the Commission under the terms of the Act

of 1907, still, as these claims had to be established against the State, our assignment of error is that the State must necessarily be a party to such adjudication as one of the beneficiaries of the trust and one interested in the fund to be disposed of, and, being such indispensable party, under the rules and practices of the Court, the Court not being able to make the State a party, the bill must be dismissed, and the Court is without jurisdiction to proceed further.

The prayers of both bills of complaint are that it shall be referred to a master to ascertain and determine the amount due the complainants for goods sold and delivered by them to the State Dispensary, and that a decree be entered ordering and directing the amounts so found to be due to be paid. The State Dispensary Commission, neither as a Commission nor as individuals, have any personal interest in the funds. They have only certain official duties to perform. There is nothing in the statute which authorizes them to appear in court to prosecute or defend actions brought by these creditors against the State, nor has the State provided in such action that its law officer shall represent it in any judicial investigation in State or Federal Court; but the claims to be investigated and determined are claims and alleged debts not of the State Dispensary Commission, but of the State of South Carolina. For we conceive that, where it is referred to a person or commission to determine upon the liability of the donor, both legal and equitable, such person or commission, as such trustee, thereby created, can not be reduced to the rank of attorney and agent for the party and required to defend his interests. The sole party interested in defeating wholly or in part each any every one of these claims is not the Commission but the State of South Carolina, which is entitled to the remainder of the money after the payment of all just liabilities. The judgment to be rendered is a judgment not against the State Dispensary Commission, but in each and every one of these claims it is a judgment against the State of South Carolina, and if jurisdiction is retained we necessarily will have a case or cases where the complainants are prosecuting claims against the State of South Carolina as their debtor in a court in which the State is not represented and is not a party, and in which it is sought to enter a decree or judgment against

her and to take funds to satisfy such judgment or decree which otherwise would belong to the State, and which, under the terms of the Act, should be returned into her treasury.

The Circuit Court of Appeals also held that the provisions of the Act creating the Dispensary Commission are strikingly similar in substance to the usual form of conveyances of property in trust for the benefit of creditors, and notwithstanding the State is the donor of the trust and is entitled to the surplus after the payment of its just liabilities to be ascertained by said Commission, and the expenses thereof, that it does not have any present interest in the fund in controversy which can be divested by a judicial determination of the true amount, if any, justly due the complainants, although it is not a party to such judicial investigation (Record, 366-367).

We respectfully submit that the Court of Appeals has committed error, and that the State is a necessary and indispensable party, even upon the assumption that the State has passed absolute control and possession of the property to the State Dispensary Commission.

In *Gregory vs. Stetson,* 133 U. S., 586, it is said:

"The rule as to who shall be made parties to a suit in equity is thus stated in Story's Eq. Pl. Sec. 72: 'It is a general rule in equity (subject to certain exceptions, which shall be hereatfer noticed) that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, either as plaintiffs os ar defendants, however numerous they may be, so that there may be a complete decree which shall bind them all. By this means the Court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the Court the whole case may be seen; but it may not where all the conflicting interests are not brought out upon the pleadings by the

original parties therto.' See, also, Daniel's Chancery Pl. & Pr., 246 *et seq.*"

The Court further said:

"In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that a court can not adjudicate directly upon a person's rights without having him either actually or constructively before it. This principle is fundamental."

In the case of *Minnesota vs. Northern Securities Co.*, 184 U. S., 235, it is said:

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of the suit are to be made parties to it, so that there may be a complete decree which shall bind them all. * * * The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasoning, and may be enforced by the courts *sua sponte*, though not raised by the pleadings or suggested by counsel;" citing cases.

Again, quoting from *Minnesota vs. Northern Securities Co., supra*:

"When it appears to a court of equity that a case otherwise presenting ground for its action can not be dealt with because of the absence of essential parties, and it further appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, as in the case before the court, when made parties, the jurisdiction of the court will thereby be defeated, it would be useless for the court to grant leave to amend."

See, also, the late case of *Garzot vs. de Rubio*, 209 U. S., 297.

Where it is clearly seen that the State is an indispensable party to enable the Court, according to the rules which govern its

procedure, to grant the relief sought, it will refuse to take jurisdiction.

Cunningham vs. Macon R. R. Co., 106 U. S. 446.

A State is an indispensable party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its obligations.

Christian vs. Atlantic, etc., R. R., 133 U. S., 233.

We do not concede that these cases come within that class in which the interests of the State may be indirectly affected by judicial proceedings without making it a party, for in those cases the title in fee or the possession of the property is not in the State, but it only has some lien or claim against it subordinate to and not involvel in the prior claim; such as in the case where it is a subsequent mortgagee. There its rights of redemption will not be affected, nor is its right necessarily involved in that of the prior mortgagee. But in this case the claims that are to be presented are disputed in toto, and the State is a party to such contract and is the proper person to make the defense against such claims.

In *Vetterlein vs. Barnes*, 124 U. S., 167, the rule is recognized, that, to a suit against trustees to enforce the execution of the trust, *cestuis que trust* claiming present interests directly opposed to those of the plaintiff should be made parties in order that they may have opportunity themselves to defend their rights and not to be obliged to rely upon the defenses made by the trustees, or to resort to a subsequent suit against the trustees of the plaintiffs, or to take the risk of being bound by a decree rendered in their absence.

But it was also stated that the rule is different where the claim of the plaintiff antedates the creation of the trust and the suit is brought, not in recognition or furtherance of the trust, but in hostility to it, as fraudulent and void.

Here it is claimed that the suit is brought to enforce the trust and not in opposition to the trust. The rule, therefore, must prevail that the State, as one of the beneficiaries of the trust and a party to these contracts, is entitled to set up all proper and legal defenses against these claims, and should be made a party to the suits, for its right to the surplus is directly dependent upon its defeating the claims which it disputes.

"In a suit to enforce the trust under an assignment, the trustee must be brought before the court; and a proceeding without notice to him would be erroneous. If the assignment is unconditional, the assignor, his heirs or representatives, need not be made parties; but if there is an express stipulation that the surplus shall be paid to the assignor, he or his representatives must be made parties."

Perry on Trusts, 3 ed., Sec. 595, citing *Houghton vs. Davis*, 23 Me., 28.

"When a trust is created for the benefit of certain specified creditors, and a suit is brought against the trustees for the execution of the trust, not only should those creditors generally be made parties, but the person who created the trust also, or his personal representative." Story, Eq. Pleadings (10th Edition), Sec. 149.

See, also, Story's Equity Pleading, 10th ed., Secs. 149 and 207; 6 Pomeroy's Equity Jurisprudence, Secs. 713, 891.

"The true principle would seem to be that in all cases where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent or validity of the assignment is not doubted or denied, and there is no remaining liability of the assignor to be affected by the decree, it is not necessary to make the latter a party. At most, he is merely a nominal or formal party in such a case.* * * But, where the assignment is not absolute and unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights or liabilities of the assignor which may be affected by the decree, there he is not only a proper but a necessary party. The general rule will hereafter occur under other

aspects where the legal estate is in one person and the equitable estate is in another, and where the equitable or legal interest assigned still leaves some rights or claims to be settled in which the presence of the assignor may be material to his own interests or to those of the adverse party."

Story's Eq. Pl., 10 ed., Sec. 153, and notes.

In *Barney vs. Baltimore City,* 6 Wall., 280, it is said:

"There is a third class (of parties) whose interest in the subject-matter of the suit and the relief sought is so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the Court can not proceed. In such cases the Court refuses to entertain the suit, and these parties can not be subjected to its jurisdiction."

"The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First, where a person will be directly affected by a decree he is an indispensable party, unless the parties are too numerous to be brought before the Court, when the case is subject to a special rule. Secondly, where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if it is possible, and the Court will not proceed to a decree without him if he can be reached. Thirdly, where he was not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

Williams vs. Bankhead, 19 Wall., 571.

Where a proceeding in equity concerns the disposal of a specific fund, a person claiming the fund and liable by a decree to have it wholly swept from him is an indispensable party.

Williams vs. Bankhead, 19 Wall., 563.

Upon a bill filed by the United States proceeding as an ordinary creditor against a debtor of its debtor for an accounting, etc., the original debtor to the United States ought to be made a party to the account taken between him and his debter.

United States vs. Howland and Allen, 4 Wheat., 108.

The reason is that a decree in favor of the United States against the debtor of its debtor would not be binding against the original debtor of the United States, and, therefore, the original debtor must be made a party to the suit.

If the rights of those not before the Court are inseparably connected with the claim of the parties litigant, so that a final decision can not be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties.

Mallow vs. Hinde, 12 Wheat., 194.

The amount due these complainants, as appears from the record, is not fixed, but is open to controversy, and, as is said in *Mallow vs. Hinde, supra,* no Court can adjudicate directly upon a person's right without the party being actually or constructively before the Court.

Chadbourne vs. Coe, 45 Fed., 822;
Ribon vs. Railroad Cos., 16 Wall., 450.

In the case of *Shields vs. Barrow,* Justice Curtis, after citing the case of *Russell vs. Clark's Executors,* 7 Cranch, 98, proceeds to classify parties to a bill in equity. He makes three classes of them: (1) formal parties; (2) persons having an interest in the controversy and who ought to be made parties in order that the Court may act on that rule which requires it to decide on a final determination the entire controversy, and to do complete justice by adjusting all the rights involved in it; while such persons are commonly termed necessary parties, yet if their interests are separable from those of the parties before the Court, so that the Court can proceed to a decree and do complete and final justice without affecting other persons not before the Court, they are

not considered indispensable parties; (3) persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

In this last class certainly this case must fall, because the State not only has an interest in the controversy as to the removal of the Commission, who, under the theory of the Circuit Court of Appeals, must be considered trustees, and as to the disposition of the fund, but its financial interest as to what shall be the surplus is of such a nature that a decree entered upon the claim of complainants to these bills must of necessity affect its rights in and to the assets held by such trustees, for if it be conceded that the Court may proceed to judgment to determine what is the just liability in these cases of the State to these parties, the State can not be concluded by such judgment unless such trustees represent it to such an extent as to be in fact and in reality the agents of the State under statutory duty to defend the interests of the State. For, if the State can, as is admitted by the Circuit Court of Appeals, intervene and set up the defenses indicated in the return of the Commission, and set out in the opinion of the Court, then the decree which would be rendered without such intervention would not be conclusive upon the State, because it had never had its day in Court. If, then, such determination, in the absence of the State, is not conclusive upon it, it follows necessarily that before effect can be given to the judgment of the Court the State should have been a party to the suit. The illustrations given by Mr. Justice Curtise in *Shields vs. Barrow* fully illustrate the necessity of the debtor, the State, being made a party to these suits.

Yet it is said by the learned Circuit Court of Appeals:

"It is insisted that the claims involved in this controversy, if due, are debts of the State, and appellants say that they represent the State, which is the real party in interest; yet, in this situation, they contend that in case of a dispute as to he validity of any of the claims, it should be left to them to decide. In other words, their position appears to be that the agents and representa-

tives of the debtor should constitute a tribunal, absolute in its character, to arbitrarily pass upon what, if anything, is due an alleged creditor, and if a claim be adjudged invalid to put an end to it without further opportunity for redress on the part of the creditor. To uphold such contention would, in our opinion, in the event that a just debt due a creditor was thus rejected, deprive such creditor of his property without due process of law." (Record, 368-369).

Unless the very confessedly novel view of the learned Circuit Court expressed in another part of the opinion, that the State of South Carolina having under its constitution and in the exercise of its police power attempted to regulate the sale and use of intoxicating liquors within its borders through certain of its own officers, could under no circumstances be immune from suit by reason of or on account of any debt contracted thereby, is correct, these alleged creditors of the State had no remedy whatsoever for the collection of their claims and could in no wise determine the mode of procedure, or the tribunal before whom they should be permitted to prove their claims. The Act, then, of 1907 was voluntary upon the part of the State, and if it created the State Dispensary Commission, a Commission to investigate and determine these claims, certainly the action of such Commission in contending that it should itself determine, as agents and representatives of the debtor, the claims before it, is not an improper construction of the Act, and the exercise of their duties can not be said to deprive the claimant of his property without due process of law. The proposition of the learned Court, therefore, that they (Commission) should constitute a tribunal absolute in its character to arbitrarily pass upon what, if anything, is due an alleged creditor, and if the claim be adjudged invalid to put an end to it without further opportunity for redress on the part of the creditor, is to deprive him of his property without due process of law, is, it is respectfully submitted, more novel than the question which the Court distinctly states that it is not its purpose to venture an opinion upon, and upon which it is very careful to say that it has no authority in point to guide it. Should a tribunal such as this, contrary to law and common right, proceed to declare a claim unjust and invalid, and to violate every principle recognized in the ascertainment of truth and the administra-

tion of justice, without remedy for such claimant, that would present an entirely different proposition, for here we must assume that there are remedies for the just and honest creditor who has been so treated, even contained in the terms and provisions of this statute itself.

It is submitted that the State to these actions not only is entitled to be heard as against the claims presented to the Court for determination against it, but is also a necessary party to an action which seeks to remove the trustees which it has solemnly appointed to determine the questions of liability between it and its alleged creditors in a manner and mode set out and prescribed by itself, with full authority and power at the time so to do.

FINALLY.

The petitioners submit:

That the fund in the hands of the Commission is property belonging to the State of South Carolina and in her possession, through her agents, the members of the Commission;

That these suits are, in effect, suits against the State, inasmuch as they must result in judgments being declared against the State upon contracts to which she is a party, and in the enforcement of such judgments taking away her property and applying it to the payment thereof; or else in judgments in her favor declaring these contracts void, or for less amounts than claimed;

That what is sought in these suits is not to require the Commission, as officers of the State, to perform duties imposed by the statute, but their purpose to usurp the duties and functions of the Commission and to substitute in place of its judicial discretion that of the Circuit Court;

That if these be not suits against the State, then they are such proceedings that the State is a necessary or indispensable party thereto, without which the Court can not proceed to judgment without necessarily and injuriously affecting the State in her financial interests and property rights. To protect this financial interest, and fulfill the duty imposed by the Constitution of preserving the net income arising from the past operations of this State department or institution—the State Dispensary—the State can not stand idly by while the inquiry is proceeding and her funds being taken and applied to the payment of claims which she avers are illegal and fraudulent; but must, if she would perform her duty and protect her property, be forced into litigation upon the question of the validity and amount of the claims which it is alleged she owes to these whiskey houses.

J. FRASER LYON,
B. L. ABNEY,
Counsel for Petitioners.

APPENDIX.

CONSTITUTIONAL PROVISIONS.

Article VIII, Section 11, Constitution 1895.

"In the exercise of the police power the General Assembly shall have the right to prohibit the manufacture and sale and retail of alcoholic liquors or beverages within the State. The General Assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the State under such rules and restrictions as it deems proper; or the General Assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the State, and may authorize and empower State, county and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations, as it deems expedient: *Provided*, That no license shall be granted to sell alcoholic beverages in less quantities than one-half pint, or to sell them between sundown and sunrise, or to sell them to be drunk on the premises: *And provided, further*, That the General Assembly shall not delegate to any municipal corporation the power to issue licenses to sell the same."

Article XI, Section 12, Constitution, 1895.

"All the net income to be derived by the State from the sale or license for the sale of spirituous, malt, vinous and intoxicating liquors and beverages, not including so much thereof as is now or may hereafter be allowed by law to go to the counties and municipal corporations of the State, shall be applied annually in aid of the supplementary taxes provided for in the sixth section of this Article; and if after said application there should be a surplus, it shall be devoted to public school purposes, and apportioned as the General Assembly may

determine: *Provided, however,* That the said supplementary taxes shall only be levied when the net income aforesaid from the sale or license for the sale of alcoholic liquors or beverages are not sufficient to meet and equalize the deficiencies for which the said supplementary taxes are provided."

STATUTES AND RESOLUTIONS.

(1.)

A CONCURRENT RESOLUTION.

To Investigate the State Dispensary.

Be it resolved by the Senate, the House of Representatives concurring:

SECTION 1. That a Joint Committee, consisting of three Senators and four members of the House of Representatives, be appointed by the presiding officers of the respective Houses to investigate the affairs of the State Dispensary.

SEC. 2. That said Committee be, and is hereby, empowered to send for papers and persons, to swear witnesses, to require the attendance of any parties whose presence shall be deemed necessary, to appoint an expert accountant and stenographer, and to investigate all transactions concerning said Dispensary and its management, and to take testimony either within or without the State, and shall have access at all times during their service to all the books and vouchers and other papers of said institution, especially in investigating the following facts:

(a) Whether or not it is a fact that houses represented by agents who are near relatives of the members of the Board of Directors, receive large orders at each purchase.

(b) Is it a fact that members of the Board of Directors are, or have been, agents for certain wholesale houses from which large purchases are made?

(c) Is it a fact that parties to whom large orders are given are not wholesale dealers, but brokers, and that the orders are filled by third persons, thus making the State pay the commissions of the middle-man?

(d) Was it necessary to purchase the large quantity of liquors ordered in December, 1904, to fill demands and especially the new and fancy goods purchased, which is unknown to the trade?

(e) Are the extraordinary heavy purchases made necessary to the best business interest of the Dispensary system?

(f) What is the financial standing of the business, and is it run on the best principles for the interest of the law as originally passed and amended?

(g) Is it a fact that the State, through the Dispensaries, is violating the Constitution of 1895, in that it is selling whiskey in less quantities than one-half of one pint?

(h) Is it a fact that the State is selling 5's in case goods to its customers and charging them for one quart?

(i) Is it a fact that certain agents are traveling over the State and offering special inducements to County Dispensers to "push" certain brands of liquors, and, if so, is it a fact known to the members of the State Board of Directors?

(j) Is it a fact that certain requirements of the law are dispensed with by County Dispensers by order of, or by the consent of, the members of the State Board of Directors?

(k) Has the whiskey which has been recently purchased been ordered out from the dealer, or is it held in reserve for future delivery?

(l) What is the indebtedness of the Dispensary for liquors which have been bought but not delivered?

(m) And any and all other matters relating to the management of the State Dispensary, and of any official or person in relation thereto.

(n) Is it, or not, a fact that excessive freights have been paid to railroads for transporting liquors into the State, when said liquors could have been shipped into the State by water at less cost to the State?

(nn) Whether there is any warrant of law or authority for the establishment and conduct of what is commonly known as "Beer Dispensaries," as they are now and have been conducted.

SEC. 3. That said Committee may at any time they may deem it advisable call to their assistance any of the State officers or employees of the State Dispensary, whose duty it shall be to render the said Committee any reasonable service that may be

required of them within the scope of its functions as prescribed by these Resolutions.

SEC. 4. That the said Committee shall convene as soon after the adjournment of this session of the General Assembly as practical, and shall organize by electing one of their number as Chairman, and shall report its findings to the next session of the General Assembly. That said Committee shall receive the same per diem and mileage as members of the General Assembly, and that the sessions of said Committee be open to the public.

SEC. 5. That nothing herein contained shall be construed to deny the said Committee the power to apply at any time to the General Assembly for such other power and authority as the circumstances arising during the investigation may seem to require.

SEC. 6. That said Committee shall have the right to punish for contempt as Courts of Common Pleas and General Sessions.

SEC. 7. That said Committee shall have a Marshal to serve its processes and keep order at its sessions, and his pay shall be fixed by said Committee. The pay of the witnesses shall be the same as that of witnesses in the Court of Common Pleas for Richland County, and all expenses shall be paid on the warrant of the Chairman of said Committee by the Liquor Commissioner out of the General Dispensary fund and charged as Dispensary expenses.

SEC. 8. That said Committee be, and is hereby, empowered to send for papers and persons, to swear witnesses, to require the attendance of any parties whose presence shall be deemed necessary, to employ expert accountants and stenographers and any other person or persons the Committee may consider necessary in the ascertainment of any facts pertinent to this inquiry; and said Committee is hereby authorized and empowered to investigate and inquire into all transactions connected with said State Dispensary and its management or control at any time in the present or past, and to investigate any and all purchases, sales, shipments, contracts, or other like transactions; and the personal connection, if any, of any member or members of the State Board of Control, or the State Liquor Commissioner, or any other citizen or official of this State, in the present or past, with any other corporation, concern or individual contracting with or supplying any spirituous

or intoxicating liquors, or other goods or commodities to said Board or Commissioner, or to the State; to take testimony either within or without the State; and to have access to all the books and vouchers and other papers of said institution or of any officer or employee thereof.

SEC. 9. That the costs and expenses of this investigation be paid by the State Dispensary, each member of said Commission to receive $4.00 per day and the usual mileage.

Passed January 31, 1905.

(2.)

AN ACT TO PROVIDE FOR THE INVESTIGATION OF THE DISPENSARY.

Whereas, a Committee has been appointed to investigate the State Dispensary under the Concurrent Resolution of the General Assembly, dated the 31st day of January, 1905; and whereas, in the progress of the work of the said Committee some doubt has arisen as to the power of the said Committee in the discharge of their duties; and it being provided in Section 5 of said Concurrent Resolution that the said Committee should apply to the General Assembly for such other power and authority as the circumstances arising during this investigation may seem to require; therefore,

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That the Committee heretofore appointed under the terms of the Concurrent Resolution, dated the 31st day of January, 1905, or any other Committee or Committees that may be appointed, are hereby authorized and empowered to elect a Marshal, who, [illegible] being sworn, shall be and become a peace officer of the State, and invested with all the power of Sheriffs and Constables in the service of any and all process issued by the Committee aforesaid, and with the power to arrest and imprison, upon the order of the said Committee, any and all persons who shall fail and refuse to obey any legal order of the said Committee, or who shall be guilty of any disorderly conduct in the presence of said Committee during any session thereof, or who shall be guilty of any contempt of the said Committee.

SEC. 2. The said Committee be, and are hereby, authorized and empowered to call before them by summons or notice, in such form as the Committee may adopt, and to be served by the Marshal of said Committee, or such other officer of the State as may be by the Committee required, such person or persons as the Committee deem proper, and to require such person or persons to answer, upon oath, any and all questions that the Committee may deem relevant and may propound to him or them; and upon the failure or refusal of such person or persons to obey such summons or notice, or to answer such question or questions, such person or persons shall be deemed to be in contempt of the authority of said Committee, and may be imprisoned upon the order of the said Committee in the common jail, to be there held until he or they shall comply with the order of the said Committee: *Provided*, That no testimony given by said witness shall be used against them in a criminal prosecution.

SEC. 3. The said Committee be, and the same is hereby, authorized to send for and to require the production of any and all books, papers, or other documents or writings which may be deemed relevant to any investigation, and to require said person or persons in custody or possession of said papers to produce the same before the said Committee, and any person or persons who shall fail or refuse to act on the order or notice of said Committee to produce said books, papers, or other documents, or writings, shall be deemed guilty of contempt of said Committee and be punished as provided in Section 2.

SEC. 4. Said Committee shall have power to administer necessary oaths, and any person who shall, after being sworn before said Committee, swear falsely, shall be deemed guilty of perjury, and, upon conviction, shall be punished as provided by law.

SEC. 5. That said Committee be, and they are hereby, authorized and directed to order the Commissioner of the State Dispensary to withhold the payment of any claims against the State Dispensary or any officer thereof, or the claims of any creditor against said State Dispensary or any of its officers, which they may deem advisable, until same is duly proved by the production of the books of the original entry, and all documents and correspondence relating to all their transactions with the State Dispensary, and to require the person or persons in custody or pos-

session of said books, documents, papers, and correspondence to produce the same before the said Committee in person, and when such proof has been submitted to and approved by the said Committee, and the State Treasurer is hereby forbidden to pay such claims upon written notice from the Chairman of the said Committee.

SEC. 6. This Act shall take effect and be in force immediately upon its approval by the Governor.

Approved the 24th day of January, A. D. 1906.

(3.)

AN ACT TO PROVIDE FOR THE DISPOSITION OF ALL PROPERTY CONNECTED WITH THE STATE DISPENSARY, AND TO WIND UP ITS AFFAIRS.

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That immediately upon the approval of this Act the Governor shall appoint a Commission of well-known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

SEC. 2. Said Commission shall immediately organize by the election of a Chairman and Secretary from their number.

SEC. 3. It shall be the duty of said Commission to close out the entire business and property of the State Dispensary except real estate, and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided*, That no alcoholic liquors or beers shall be disposed of within this State except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel

as may be approved by the Attorney-General, and such expert accountants and stenographers and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State: *Provided, further,* That all payments shall be made in gold and silver coin of the United States, in United States currency, or in national bank notes.

SEC. 4. The compensation of each member of said Commission shall be $5 per day for each day actually employed about the business, and actual expenses for the time engaged: *Provided,* That they shall receive no compensation for services rendered on this Commission after January 1, 1908.

SEC. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

SEC. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employees as they may deem necessary, and to contract with them at the time of employment for their compensation.

SEC. 7. The said Commission shall submit to the Governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated a report in full of their actings and doings.

SEC. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee Appointed to Investigate the Affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved 24th January, A. D. 1906, be, and hereby is, conferred upon the Commission provided for under this Act: *Provided,* That for the purpose of the investigation of the affairs of the Dispensary, as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

Approved the 16th day of February, A. D. 1907.

(4.)

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO PROVIDE FOR THE DISPOSITION OF ALL PROPERTY CONNECTED WITH THE STATE DISPENSARY AND TO WIND UP ITS AFFAIRS," SO AS TO PROVIDE COMPENSATION FOR MEMBERS OF THE SAID COMMISSION FOR THE YEAR 1908, AND TO PROVIDE FOR THE SALE OF THE REAL ESTATE HERETOFORE USED IN CONDUCTING THE DISPENSARY, AND TO FURTHER PROVIDE FOR WINDING UP THE AFFAIRS OF THE STATE DISPENSARY.

SECTION 1. *Be it enacted* by the General Assembly of the State of South Carolina, That an Act entitled "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its affairs," approved the 16th day of February, 1907, be, and the same is hereby, amended by striking out the figure 8 at the end of Section 4, and inserting in lieu thereof the figure 9, and by adding at the end of said section the following: "That in addition to the compensation herein provided for, each member of said Commission shall be allowed the sum of ($150.00) one hundred and fifty dollars:" *Provided, further,* That the per diem provided for herein shall begin on the date of the approval of this Act.

SEC. 2. That said Act be further amended by adding at the end thereof the following as Section 9: "Section 9. That the Commissioners of the Sinking Fund be, and they are hereby, authorized and required upon being notified by the State Dispensary Commission, that the real estate heretofore used for the offices and ware-rooms, the typewriters, adding machines, files, metal, and other furniture in the offices and ware-rooms, etc., of the Dispensary, and located at the corner of Gervais and Huger streets, in the City of Columbia, is no longer in actual use, to sell same under and pursuant to the terms of Section 91, Code of Laws of South Carolina, Vol. I, 1902: *Provided,* That the said property shall not be sold for less than seventy-five thousand dollars ($75,000.00), and the proceeds of such sale shall be turned into the State Treasury and applied to school purposes, as provided for by the Constitution of 1895, and the Acts of the Legislature carrying out the same: *Provided, further,* That the typewriters, adding machines, files, metal, and other furniture may be trans-

ferred by the Commissioners of the Sinking Fund to any of the State offices that, in the judgment of the Commissioners, may need them.

SEC. 3. That said Act be further amended by adding the following as Section 10: "Section 10. That the judgment heretofore rendered in the Court of Common Pleas for Richland County against U. B. Hammet and W. O. Tatum, on account of liquors improperly seized by them and used by the State, together with the costs and expenses of defending the said suit, be paid by the Dispensary Commission out of the assets now in their hands belonging to the State, and arising from the assets of the Dispensary."

SEC. 4. That said Act be further amended by adding the following as Section 11: "Section 11. That said Commission is hereby declared to possess full power to pass upon, fix and determine all claims against the State growing out of dealings with the Dispensary, and to pay for the State any and all just claims, which have been submitted to and determined by it, and no other, out of the assets of the Dispensary which have been, or may hereafter be collected by said State Dispensary Commission: *Provided*, That each and every person, firm or corporation presenting a claim or claims to said Commission shall have the right to appeal to the Supreme Court as in cases at law: *Provided further*, That notice of intention to appeal shall be served upon said Commission within ten days of rendition of judgment by the said Commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court." So that said Act, when so amended, shall read as follows:

Section 1. *Be it enacted* by the General Assembly of the State of South Carolina, That immediately upon the approval of this Act the Governor shall appoint a Commission of well known business men, consisting of five members, none of whom shall be members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.00.

Sec. 2. Said Commission shall immediately organize by the election of a Chairman and Secretary from their number.

Sec. 3. It shall be the duty of said Commission to close out

the entire business and property of the State Dispensary, except real estate, and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided,* That no alcoholic liquors or beers shall be disposed of within this State, except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney-General, and such expert accountants and stenographers and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State: *Provided, further,* That all payments shall be made in gold and silver coin of the United States currency or in national bank notes.

Sec. 4. The compensation of each member of said Commission shall be five dollars ($5.00) per day for each day actually employed about the business and actual expenses for the time engaged: *Provided,* That they shall receive no compensation for services rendered on this Commission after January 1, 1909; *Provided further,* That in addition to the compensation herein provided for, each member of said Commission shall be allowed the sum of one hundred and fifty dollars ($150.00): *Provided, further,* That the per diem provided for herein shall begin on the date of the approval of this Act.

Sec. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

Sec. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants, and employees as they may deem necessary, and to contract with them at the time of employment for their compensation.

Sec. 7. The said Commission shall submit to the Governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated a report in full of their actings and doings.

Sec. 8. The said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary and all the power and authority conferred upon the Committee appointed to investigate the affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved 24th January, A. D. 1906, be, and hereby is, conferred upon the Commission provided for under this Act: *Provided*, That for the purpose of the investigation of the affairs of the Dispensary as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

Sec. 9. That the Commissioners of the Sinking Fund be, and they are hereby, authorized and required, upon being notified by the State Dispensary Commission, that the real estate heretofore used for the offices and ware-rooms, etc., of the Dispensary, and located at the corner of Gervais and Huger streets, in the City of Columbia, is no longer in actual use, to sell the same under and pursuant to the terms of Section 91, Code of Laws of South Carolina, Vol. I, 1902: *Provided*, That the said property shall not be sold for less than seventy-five thousand dollars ($75,000.00), and the proceeds of such sale shall be turned into the State Treasury and applied to school purposes, as provided for by the Constitution of 1895, and the Acts of the Legislature carrying out the same.

Sec. 10. That the judgment heretofore rendered in the Court of Common Pleas for Richland County against U. B. Hammett and W. O. Tatum, on account of liquors improperly seized by them and used by the State, together with the costs and expenses of defending the said suit, be paid by the Dispensary Commission out of the assets now in their hands belonging to the State and arising from the assets of the Dispensary.

Sec 11. That said Commission is hereby declared to possess full power to pass upon, fix and determine all claims against the

State growing out of dealings with the Dispensary. And to pay for the State any and all just claims which have been submitted to and determined by it, and no other, out of the assets of the Dispensary which have or may hereafter be collected by said State Dispensary Commission: *Provided,* That each and every person, firm or corporation presenting a claim or claims to said Commission shall have the right to appeal to the Supreme Court, as in cases at law: *Provided, further,* That notice of intention to appeal shall be served upon said Commission within ten days of rendition of judgment by the said Commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court.

Sec. 12. That no funds arising from the sale of the assets of the former State Dispensary, or from the collection of debts due the said Dispensary, or moneys delivered by the State Treasury to said Commission, shall be paid out for any purpose or to any person whatsoever, except upon the check of the chairman of said Commission, countersigned by the Treasurer of the State of South Carolina. And the Treasurer of the State of South Carolina shall countersign such checks as may be presented by the chairman of said Commission only upon presentation of the same, together with a certificate of said Commission or a majority thereof, which certificate shall show: that the said check is issued in payment of some expense provided for by statute, or necessarily incident to closing up the affairs of the Dispensary, or for services rendered said Commission in closing up the affairs of said Dispensary, or contracted for in accordance with law by said State Dispensary Commission, or that it is in payment of a claim of a creditor which has been adjudged by said Commission to be due, and upon such adjudication ordered paid.

In the Senate-House the 21st day of February, in the year of our Lord, one thousand nine hundred and eight.

THOS. G. McLEOD,
President of the Senate.
RICHARD S. WHALEY,
Speaker of the House of Representatives.
Approved the 24th day of February, A. D. 1908.
M. F. ANSEL,
Governor.

(5.)

AN ACT TO MAKE APPROPRIATION TO MEET THE EXPENSES OF CRIMINAL PROSECUTIONS AND PROCEEDINGS AGAINST CERTAIN OFFICERS AND OTHER PERSONS, AND TO PROVIDE FOR THE PAYMENT THEREOF.

Section 1. *Be it enacted* by the General Assembly of the State of South Carolina, That the sum of fifteen thousand dollars, or so much thereof as may be necessary, be, and is hereby, appropriated to meet the expenses of any criminal prosecutions that have been or may be commenced against any person or persons charged with violation of the law in any manner connected with the late institution called the State Dispensary, including expenses of associate counsel, and such other expenses as may be incident thereto: *Provided,* That the Attorney-General shall not employ any member of the General Assembly as attorney in said prosecutions.

Sec. 2. That the said sum of fifteen thousand dollars shall be paid into the State Treasury by the State Dispensary Commission out of any funds in its hands arising from the business or property of the State Dispensary, and the same shall be paid out by the State Treasurer upon the warrant of the Comptroller-General; and accounted for in the same manner as other funds appropriated for the use of the Attorney-General's office.

Sec. 3. That this Act shall take effect immediately upon its approval by the Governor.

In the Senate-House the 22d day of February, in the year of our Lord, one thousand nine hundred and eight.

THOS. G. McLEOD,
President of the Senate.
RICHARD S. WHALEY,
Speaker of the House of Representatives.

Approved the 24th day of February, A. D. 1908.

M. F. ANSEL,
Governor.

FILED
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 615.

W. J. MURRAY, JOHN McSWEEN AND AVERY PATTON,

Constituting the Dispensary Commission of South Carolina et. al., Petitioners,

vs.

THE WILSON DISTILLING CO. *et. al.*, AND THE FLEISCHMANN CO.

BRIEF OF W. F. STEVENSON AND D. S. MATHESON, FOR PETITIONERS IN REPLY.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1908.

No. 625.

W. J. MURRAY, *et. al.*,
Petitioners,

vs.

THE WILSON DISTILLING CO. *et. al.*

BRIEF OF W. F. STEVENSON AND D. S. MATHESON, IN REPLY IN UNITED STATES SUPREME COURT FOR APPELLANTS.

The facts are fully stated in the briefs of appellants attorneys, on motion for Writ of Certiorari and on opening argument. It is only my intention to reply to some of the arguments put forth by Appellees heretofore and on motion for Certiorari.

Two positions are taken:

1st. That the dispensary commissioners are trustees for the benefit of creditors of the State and

2nd. That the suit is not against the State and the State is not a necessary party to the proceeding in equity.

We will note first the admitted facts:

(a) That Sotuh Carolina owned the business and assets before the Acts of February 16, 1907, and that the claims for purchase money are the State's debts.

This must necessarily be the case on the theory of the defendants because they claim that she conveyed the assets to the dispensary commission in trust for her creditors. She could not create a trust estate out of property not her own.

(b) It is admitted that she owns the surplus after all just liabilities arising out of the dispensary business is paid.

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(c) It is admitted that the claims of appellees are in dispute and must be settled in some forum.

This is shown by the opinion of the Circuit Court of Appeals, page 361, record. The following question is asked: "The fund being in the hands of the commission charged with this duty, to the state has no interest in so much thereof as is necessary to pay the just debts. Then how can it infringe any right
6 of the State to have the true amount of the debts due by the defunct dispensary judicially ascertained?"

It is also shown by each bill the prayer being for the proper orders to ascertain the amount due on their respective claims. (See pages 5 and 27 of the Record.)

(d) Therefore it is admitted that no decree can be rendered on any claim in suit that will not effect
7 directly the pecuniary interest of South Carolina by either increasing or diminishing the amount of the surplus going to her. Add $1,000 to the Fleischman account and you take away that amount from the State and this brings the case squarely within the case of Reagan vs. Home Loan and Trust Co., 154 U. S. 388, cited by appellees. We quote:

"To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh
8 Amendment, requires that it should be interpreted, not literally and too narrowly, but fairly, and with

such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against the State by name, but those also against its officers, agents and representatives, where the State, though, not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

"Appellants insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the State, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of State officers under a constitutional statute is not subject to challenge in the Federal Court. We are unable to yield our assent to this argument. So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its government character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well being of its citizens, in the just and equal enforcement of all its laws; but such governmental *interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered.*"

The Court will note that the concluding sentence in the citation lays emphasis upon the fact that the government interest indirectly affected was not a pecuniary interest and that not a dollar would be taken from the treasury of the State and no pecuniary obligations would be enforced nor any of its property affected by the decree, and hence they held in that case that the State was not a necessary party, plainly
13 inferring that if the pecuniary interest of the State were directly affected, it could not be maintained. The Reagan case was one as to rates on railroads and not as to State funds. Our first position is that the state is a necessary party, it being admitted that the State's pecuniary interest is directly affected by every decree rendered, counsel for appellees endeavor to escape the universal rule that you cannot adjudge against a party not before the court by first resorting
14 to the assumption that courts can do no wrong. We find the brief of Messrs. Bernard & Lester in the court below contains the following: "The State has provided that the just liabilities of the State dispensary should be paid, and certainly it cannot be presumed that the court will not fully protect the interests of the State in deciding what is a just liability." See also page 16 of brief against certiorari. No presumption exists that any court will make an un-
15 just decree without the parties whose interests are affected by it are before the court. It is a universal rule, crystalized in the constitution of the United States and all the States, that to adjudge right when the owner of the right is not before the court is taking property without due process of law and void and it is as true when the right is that of the State as when it is that of an individual. While it is presumed the court will do justly it cannot do anything valid at all affecting the State's interest in a fund un-
16 less the State is before the court. In Pennoyer vs. Neff, 95 U. S., 714, it is laid down that a judgment

rendered without the service in the State or voluntary appearance of the party upon whom alone it operates is null and cannot be relied upon for any purpose as being without due process of law. Now, no doubt the court rendering the judgment was "presumed" to do right, but that did not dispense with presence of the defendant. But the learned counsel for Wilson Distilling Company, recognizing this says (page 44 of their brief filed in opposition to *Certiorari*): "In other words that it being their duty to see that the surplus was paid to the State after debts contracted for the purchase of liquor had been extinguished, the State was and is, through them constructively before the Court, as the record now stands." Is this true? If so, the Court had no jurisdiction. We find them going in this circle. The suit is not against the State, therefore the State not being before the Court, the Court has jurisdiction, but the State is before the Court constructively, and a decree directly affecting its pecuniary interests can be rendered; anyway as the Court is presumed to do justice whether the party is before the Court or not, it is all right.

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Our friends go on and say, page 45: "The presence of the State, therefore, was only necessary to fix the amount to be paid the creditors and so long as the commissioners are before the court the State is represented by and through them and her interests can be thus fully protected." Again on page 46: "If, therefore, the object of the winding up statute in the case before the Court was to ascertain primarily what debts were due, and the commissioners themselves were to determine, as representing the State, as they claim, then the State as a beneficiary is constructively before the Court as the matter now stands." This is another admission that the State is a party in essence, and that therefore the Court has no jurisdiction.

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Our second position is that the State is shown by the bills (pp. 22 and 111 Record) to have an interest in the fund, there being more than the amount necessary to pay claims filed and the surplus being admittedly less. Indeed, if there was no surplus but a prospective deficit, she would be equally interested for she is the debtor and in good conscience must pay any balance left due after the application of the
21 assets. Our further position is that she committed the determination of the balance due to the commission and was willing to risk the commission alone to determine that and she had a right to prescribe the form in which the claim should be established and to change that provision at will. The attorneys for Fleischmann Company concede that the State intended that the commission should determine the justness and necessarily the amount of all claims.
22 Page 16 of their argument against certiorari they say: "It is plain from the provisions of the act itself that the State of South Carolina intended that the question of whether or not a claim presented to the commission was a just liability of the State dispensary should be settled by the commission." This being the case it is clear that the commission was within its rights in settling these questions and that they had absolutely no personal interest in the result of
23 the litigation and are clothed with a discretion which could not be controlled by the Court and any judgment against them would not affect them, but the State, and the action is therefore essentially against the State and will result in the enforcement of the performance by the State of an alleged contract which makes it a suit against the State. In Hagood vs. Southern, 117 U. S., 67 and 68, this Court defines this rule as follows:

24 "The controversy in which the validity and obligation of the script are involved is the subject of the

present suits. The complainants as holders of this script, in behalf of themselves and all other holders choosing to take part, are seeking to obtain, by judicial process, its redemption by the State, according to the terms of the statute in pursuance of which it was issued, by the levy, collection, and appropriation of special taxes pledged to that purpose, as they claim, by an irrepealable law, constituting a contract protecting from violation by the Constitution of the 25
United States. And such are the decrees which have been rendered according to the prayers of the bills. The suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and, except with that consent, it could not be brought be- 26
fore the court and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party.

The citations could be multiplied but they are all to the same effect.

If the suit under this definition is against the state 27
that ends it.

Now how do they attempt to evade this position? They say that the commission is a trustee for an express purpose and has a certain fund in its possession put there for plaintiff and other creditors of the dispensary. They ignore the fact that it is also for the State, which has an iterest in the fund, increased or diminished, by the amount of the other claims. 28
They cite McKee vs. Laman, 159 U. S., 317, to support this position. In that case the Cherokee

nation had agreed to pay Laman's firm 30 per cent. of all collections on a certain claim. They also had the money paid over to McKee under a contract with him that he should pay the claim of Laman. The Choctaw nation got 70 per cent. and McKee 30 per cent., and then refused to pay Laman and set up that the suit to make him do so was a suit against the Choctaw nation. The Court says: "The
29 suit is neither directly nor indirectly against the Choctaw nation and if made a party defendant would the complainants be entitled to relief against the nation? No claim is made against it * * * By its second contract it agreed to pay the same 30 per cent. upon an amendment which had already been fixed." * * * "The Choctaw nation had really no interest in the 30 per cent. The stipulation was made by Blunt & McKee for the benefit of the part-
30 ies interested in the per centage, and as soon as the money was recovered by them or either of them they would hold it as trustees for the persons legally and equitably entitled to it."

The plain inference is that if the Choctaw nation had an interest in the fund the suit could not proceed. If the dispensary commission had been directed to collect the assets and pay over 30 per cent. of it to the creditors then the State would not be en-
31 titled to be heard, but she is one of the parties legally and equitably entitled to the fund, and her rights can only be adjudicated by the Court when she is present. They cite also (page 16, Bernard & Lester brief against certiorari) Board of Liquidation vs. McComb, 92 U. S., 531. That case makes no holding as to trusts created by a State, but does hold the following: "A State without its consent cannot be sued by an individual, and a court cannot substi-
32 tute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter." Here is shown above the commission

was in the first instance clearly vested with discretion to allow or disallow a claim and that discretion cannot be usurped by any court. In the case cited the court merely stepped in to prevent the Board of Liquidation from misapplying the bonds of the State in plain violation of the State's contract, under color of an unconstitutional statute violating said contract with the plaintiff.

Messrs. Bernard & Lester also cite Ford vs. Delta Pine Land Co., 164 U. S. 662, as to the trust feature of their argument. In that case the State of Mississippi created a levee board and directed that they issue bonds to close up levee debts and pledged all taxes and other assets of the board to secure same. The creditors took said bond on said pledge and when default was made a holder brought an action against the board to require it to apply the assets to said purpose. There was no dispute about the amount due on the bonds. The Supreme Court of Mississippi held that the bondholders had a right to have the security so applied. This Court decided the case in favor of the State on another point, but say: "Be that as it may, this decision, followed as it was by subsequent decisions of the Supreme Court, is a construction of the Act of 1867, which is not only binding on this Court but commends itself to our judgment." So instead of deciding the case on any trust ground they decided that feature of it on the ground that the decision of the State court on another ground entirely was binding on this Court, and this too on appeal from the Circuit Court of the United States.

They cite Chaffraix vs. Board of Liquidation, 11 Fed. 638. But this case was stated by Judge Pardee to depend on the decision of the Elliott case then in this court, and that case is reported with the Jumel case, 107 U. S., 711, and they expressly repudiate

the trust theory and say: "It is insisted that the money in the treasury collected from the tax levied for the year 1879 constitutes a trust fund of which the individual defendants (Board of Liquidation) are trustees, and that they may be enjoined as such trustees from diverting it from the purposes for which it was pledged under contract." The Court says: "The treasurer is no more a trustee of these moneys
37 than he is of all other public moneys. He holds them, but only as the agent of the State. If there is any trust, the State is the trustee, and unless the State can be sued, the trustee cannot be enjoined. The officers owe duty to the State alone and have no contract relations with the bondholders." So fell the great case of Chaffraix vs. Board of Liquidation, the very same fund being in controversy, and Judge Pardee expressly stating in the opinion that the de-
38 cision of the Elliott case, then in United States Supreme Court, would determine the question and it swept away the theory of Judge Pardee and established that of Judge Billings. They cite: Swasy vs. A. & N. C. R. R. Co., 23 Fed. Cases 518. But this is distinctively repudiated in Christian vs. A. & N. R. R. Co., 133 U. S., 241, in the following:

"How the dividends due to the State can be seized and appropriated to the payment of the bonds, or
39 how the stock held and owned by the State can be sold and transferred through the medium of a suit in equity without making the State a party to the suit, it is difficult to comprehend. The general rule certainly is that all persons whose interests are directly to be affected by a suit in chancery must be made parties. Russell vs. Clarke's Executors, 7 Cranch, 68, 98; Shields vs. Barrow, 17 How., 130, 139; Ribon vs. Railroad Cos., 16 Wall., 446; Williams
40 vs. Bankhead, 19 Wall., 563; McArthur vs. Scott, 113 U. S., 340. The exceptions of the rule are pointed out in these cases, and do not touch the

present case. The State has a direct interest to be affected by such a proceeding. The proposal is to take the property of the State and apply it to the payment of its debts due to the plaintiff, and to do it through the instrumentality of a court of equity. * *

"If the mortgagor be a private person the mortgagee may cite him to court and have a decree for the foreclosure and sale of the property. The mortgagor, or his assignee, would be a necessary party in 41
such a proceeding. Even when absent beyond the reach of process, he must still be made a party, and at least constructively cited by publication or otherwise. This is established by the authorities before referred to, and many more might be cited to the same effect. The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right. But where the mortgagor in
possession is a sovereign State, no such proceeding 42
can be obtained. The mortgagee's right against the State may be just as good and valid, in a moral point of view, as if it were against an individual. But the State cannot be brought into court or sued by a private party without its consent. It was at first held by this court that, under the Constitution of the United States, a State might be sued in it by a citizen of another State, or of a foreign State; but it was declared by the Eleventh Amendment that the judicial 43
power of the United States shall not be construed to extend to such suits. New Hampshire vs. Louisiana, 108, U. S., 76; Louisiana vs. Jumel, 107, U. S., 711; Parsons vs. Marye, 114 U. S., 325; Hagood vs. Southern, 117 U. S., 52. In re Ayers, 123, U. S., 443. * * *

"It remains true, therefore, that a Bill will not lie to effect a foreclosure or sale, or to obtain possession of property belonging to the State; for the 44
very plain reason that, in such a case, the State is a

necessary party and cannot be sued. This was distinctly held by this court in the case of Cunningham vs. Macon and Brunswick Railroad, 109 U. S., 446. * * *

"Whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rule which governs its procedure, to grant the relief sought, it will refuse to take jurisdiction.'
45 Again: 'In the case now under consideration, the State of Georgia is an indispensable party. It is, in fact, the only proper defendant in the case. No one sued has any personal interest in the matter, or any official authority to grant the relief asked. No foreclosure suit can be sustained without the State, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the
46 actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia in the property of which she has both the title and the possession.'

"These remarks are strikingly applicable to the present case. The State of North Carolina is the only party really concerned. The whole proceeding
47 is really against her. The object of the suit is to get possession of her property; to sequester her dividends (if any there may be) and to compel the payment of them to the complainants; to seize and sell her stock in the railroad, stock of which she is in sole possession. Be it true that the bondholders have a lien on said dividends and stock it is not a lien that can be enforced without suit, and that a suit against the State.

48 "We are referred to a decision made at the Circuit by Chief Justice Wait in the case of Swasey vs. North Carolina Railroad Co., 1 Hughes, C. Ct. 17,

in which, in a case similar to the present, it was held that, inasmuch as the shares of stock belonging to the State were pledged for the payment of complainant's bonds, they were held by the railroad company as trustees for the bondholders as well as the State; and that if the trustee was a party to the suit it was not necessary that the State should be a party. We are not certain that we are fully in possession of the facts of that case; but if they were the same as in the present case, with the highest respect for the opinions of the lamented Chief Justice, we cannot consent to the conclusions to which he arrived. In the general principles that a State cannot be sued; that its property, in the possession of its own officers and agents cannot be reached by its creditors by means of judicial process, and that in any such proceedings the State is an indispensable party; Chief Justice Waite certainly did express his emphatic concurrence in the able opinion delivered by him on behalf of the Court in the case of Louisiana vs. Jumel, 107, U. S., 711. His views in Swasey case seem to have been based on the notion that the stock of the State was lodged in the hands of the railroad company as a trustee for the parties concerned, and was not in the hands of the State itself, or of its immediate officers and agents."

So the cases cited on the trust question are mostly overruled cases and these not overruled have no bearing on the case at bar.

They cite Clews vs. Jamison, 182 U. S. 461, and that case merely establishes the rule that where money is deposited with a stakeholder under certain rules of the stock exchange by two parties to a contract to be paid out on certain conditions, the stakeholder becomes a trustee for the parties in interest, and if a dispute arises as to whether the terms have been complied with, the court of equity can inter-

vene and enforce the trust, the Court saying: "The maintenance of this suit enables the whole question between all the parties to be determined therein. * * * Such relief cannot be obtained in any action at law." As the Court will see the case was largely one of construction of the rules of the stock exchange and the Court assumed jurisdiction because "with all parties before it," it could do full
53 justice, the ability to have all parties before it, the "trustor," as the State is called by the C. C. A. as well as the trustee and *cestui que trust* and settle all disputes between them. This case strongly sustains our position that the State is a necessary party. The party putting the fund in the hands of the governing committee as well as the party claiming the same being both before the Court with the committee, the Court sustains the jurisdiction of equity ex-
54 pressly on that ground.

The case of Baring vs. Dabney, 19 Wallace 1, is cited as bearing out the contention that the act of the legislature constituted the funds of the dispensary a trust fund and an agreement to receive it as such would make a contract relation that could not be impaired. In that case the State of South Carolina appropriated the assets of the State Bank to the payment of certain of its own obligations and subse-
55 quently repealed this act and those holding the debts referred to claimed the repeal to be a violation of the contract. The State Supreme Court held that the original act was unconstitutional and the plaintiffs therefore took no rights under it and therefore had none impaired by repeal. The Supreme Court of the United States held that if there were a valid law of that kind it would create a trust fund, and if a *cestui que trest* complied with the conditions, his
56 rights would vest and could not be divested by subsequent legislation, but that the original law was void as held by the State Supreme Court and there-

fore no such right had ever vested hence plaintiffs were properly dismissed by the State Supreme Court. It will be seen therefore that the question of a trust did not enter into the case at all, was not necessary to the decision and should not have been considered. The Court then (owing to the vacancy of the Chief Justiceship) was composed of eight members, and three of them dissented from the part of the opinion relied on in the following language: "I cannot 57
regard the eleventh section of the act of the General Assembly of South Carolina, passed December 21, 1865, as amounting either to an assignment or a declaration of a trust of the property of the bank in favor of the holders of the five loan bonds. In my opinion it affected no transfer either legal or equitable and vested no interest in the creditors." This dissenting opinion is by Justice Strong, concurred in by Justices Miller and Davis, who say they all con- 58
cur in the opinion that the creditors had no vested rights, but not in the position that if the act was valid it would give them such rights. So this case is of no practical force.

Messrs. Bernard & Lester (page 15 of brief against certiorari) cite U. S. vs. Peters, 5 Cranch 136, in support of the position that if the mere suggestion of property in the State is made it will not do to stop the investigation there, but the Court has jurisdiction 59
to investigate if the State's title is valid. This is not the case here. Plaintiffs in their bills allege that the State has an interest in the fund and show that the establishment of each claim will either increase or diminish that interest. It is no suggestion. It is an established fact from the pleadings.

The case of U. S. vs. Peters was one where Pennsylvania had had her day in the prize court and lost. The money had been paid to David Rittenhouse 60
who had given a bond to pay it to the State of Penn-

sylvania if ever so adjudged. Pennsylvania having had it once adjudged against her made no such claim for 20 years and the rightful claimants were adjudged to have it in suit against Rittenhouse carrying out the decree of the Court of Appeals of prize cases. The Court says: "The suit was not instituted against the State or its treasurer but against the executors of David Rittenhouse for the pro-
61 ceeds of a vessel condemned in the Court of Admiralty which were admitted to be in their possession." The case is different from this. The Court of Appeals in the early days had decided that the State had no interest and the parties in possession claimed them in their own right. The State had once had its day in Court, hence it could not have asserted a right successfully if present.

They cite also the cases of Louisville & C. R. R.
62 Co. vs. Leston, 2 How, 551, as to the same position. That was a case where the State was a stockholder in a railroad and the suit was contested on the ground that the State was interested. So also was the case of U. S. Bank vs. Planters Bank of Ga., 9 Wheaton. These cases illustrate the meaning of the term used as to "affecting same interest of the State." When the State is a stockholder in a corporation a judgment against the corporation may be taken, although
63 it affects indirectly the interest of the State in reducing its stock value. But it does not *affect directly the State's* pecuniary affairs, it being only indirect and consequential, and that is the class of cases where the State is not necessarily a party. But there is a class where it is necessarily a party and that is where its *pecuniary interest* is *directly affected* by any *judgment* rendered in the cause.

Tindal vs. Wesly, 167 U. S., 220, is also cited. In
64 that case the State sold and conveyed the land in question to Wesly. After the same had been so con-

veyed the Governor decided to attempt to rescind the sale and the Secretary of State Tindal refused to deliver possession.

Action was brought for possession and Tindal claimed to hold for the State. He was a trespasser, and if he had been able to show that the State had title and not Wesly, his justification would have been sufficient under that line of cases where parties sued for acts committed, trespassing on the rights of others and justified under authority of the State or United States. It is held that the plea is good if the authority is lawful, but if it is not lawful it fails. Here Tindal failed to show that South Carolina owned the property, hence his plea failed. The Court says: "And when such officers or agents assert that they are in rightful possession they must make good that assertion when it is made to appear in a suit against them that the legal title and right of possession is in the plaintiff." In that case it was expressly adjudged that it did not affect the right of the State in any respect insomuch as she was not before the Court. The Court says: "It is said the judgment in this case may conclude the State, not so. It is a judgment to the effect only that as between the plaintiff and defendants that the former is entitled to the possession of the property in question; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit the judgment will not conclude it. Not having submitted its rights to the determination of the Court in this case, it will be open to the State to bring any action it sees fit to establish and protect any claim it has to the premises in dispute."

Now, in the case at bar, it is not to dispose of the *possession* of real property leaving the State's interests, which are not dealt with untouched, but it is a pro-

ceeding to disburse funds in which the State is admitted to have an interest, which will be affected by every judgment rendered, directly and pecuniarily, and which is to be paid away finally under the orders in this cause leaving the State no recourse hereafter. If the State is not before the Court, she is not bound and the suit to finally dispose of the fund requires that she be before the Court under Tindal vs. Wesly.

69 They also cite the case of Pennoyer vs. McCannoughy, 140 U. S. 1, to establish their contention that the suit is not one against the State or in which it is a necessary party. That was a case against officers enforcing invalid legislation and attempting to justify under it. The Court says: "It is well settled that no action can be maintained in any Federal Court by the citizens of one of the States against the State, without its consent, even though the sole ob-
70 ject of such suit be to bring the State within the operation of the constitutional provision, which provides that "no State shall pass any law impairing the obligations of contracts," this immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the Court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel
71 them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself."

"'In the application of this latter principle, two classes of cases have appeared in the decisions of this Court, and it is in determining to which class a particular case belongs that differing views have been presented.'

72 "'The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, and thus making it,

though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contract. *In re Ayers*, 123 U. S., 443; *Louisiana vs. Jumel*, 107 U. S., 711; *Antoni vs. Greenhow*, 107 U. S., 769; *Cunningham vs. Macon and Brunswick Railroad*, 109 U. S., 446; *Hagood vs. Southern*, 117 U. S., 52.'

"'The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and, under the color of an unconstitutional statute, commit acts of wrongs and injury to the right and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the State. *Osborn vs. Bank of the United States*, 9 Wheat 738; *Davis vs. Gray*, 16 Wall, 203; *Tomlinson vs. Branch*, 15 Wall., 460; *Litchfield vs. Webster County*, 101 U. S., 773; *Allen vs. Baltimore and Ohio Railroad*, 114 U. S., 311; *Board of Liquidation vs. McComb*, 92 U. S., 531; *Poindexter vs. Greenhow*, 114 U. S., 270.'

The case of Rolston vs. Crittenden, 120 U. S., 390, is cited also. In that case the State of Missouri loaned $3,000,000 of its bonds to the Hannibal & St. Joseph R. R. Co., and in 1865 passed an Act allowing the company to pay back the face of the bonds and the interest on them to date of payment and discharge its liability and get an assignment of the mortgage held by the State on the Railroad.

They waited 16 years after the Act was passed and then paid in the full amount fixed by the statute and on refusal of the officers to assign the lien they brought the action to require it to be done. The court required it to be done. They say that there was much evidence of many transactions between the State officers and the Railroad officers "but we have not deemed it necessary to give either of these
77 matters consideration, because officers of the State could only do what was authorized by the statutes which was enacted for the government of their conduct in the matter, and the rights of the parties depend alone upon the legal effect of those statutes. * * * The State had a right to pass the law and when passed it was binding on those whose duty it was to obey."

The amount was admitted, the law was imperative
78 and the State officers ignoring both were trying to sell the property of the railroad under the lien which under the statute had been paid and only the plain legal duty of assigning the lien and desisting from selling under it remained. The court required the officers to carry out the statute and assign it.

The case, however, is instructive, in that, after the railroad accepted the terms of the Act and arranged to pay the money the Legislature passed an
79 amendatory Act requiring them to pay not only the money and accrued interest but also an amount sufficient to indemnify the State from loss on account of the difference between the rate of interest that the $3,000,000 bore and the rate borne by the bonds of the State that could be retired when the payment was made, and it enforced the difference which was a matter of calculation and amounted to $133,-646.46. The entire matter though was merely one
80 of calculation and construction of statutes and there was no question of there being a *bonafide* contract

with the State or bonafide compliance with the statutes regulating the same and the duty of the officer was without discretion, and it was not committed to him to ascertain how much if any was due or investigate the question whether it was bonafide but the only thing to do was to receive the money under the terms of the Act and make the assignment directed by the Act. The only question was, what does the Act mean? That being settled the duty 81
was purely ministerial.

Finally they fall back on the position that a State loses its immunity from suit by engaging in trade—cite United States Bank vs. Planters Bank of Ga., 9 Wheaton and South Carolina vs. United States. The cases like the bank case were where the State owned part or all the stock in a corporation and the defence was set up that you could not sue the corporation because the State was interested. Very properly the 82
Court held that the corporation was different from the State and the State's stock didn't prevent the suit. That the State's interest was not directly affected by the judgment, but only indirectly so.

The case of South Carolina vs. United States was an action in the Court of Claims to recover the internal revenue tax paid by its agents as wholesale and retail liquor dealers. The expression of the Court 83
that the immunity of the State's agencies *from taxation*, not of the State *from suit*, was a result of the principle that the agencies of government could not be taxed and that this meant the agencies of government as understood when the Constitution was adopted.

The Court says there is no express inhibition against Congress levying a tax on State governmental functions and agencies, but it is from the principle 84
that the power to tax involves the power to destroy and the national government has no power to destroy

the State government and *vice versa*. Hence the power to tax governmental agencies as understood at the adoption of the Constitution is denied, "but when the State engaged in a business which is of a private nature, that business is not withdrawn from the taxing power of the government" for the very good reason that it might work to the same end that the taxation could be made to work towit, destruction of the national government by the State's taking over all forms of business taxed by the national government and cutting off its revenue entirely. The question of the power to tax agencies of the State government by the United States government is no relation within the sixth decree of the right of a non-resident corporation to sue a sovereign State on account of a debt contracted in the exercise of its police powers. The Eleventh Amendment prohibits any suit against a State by individuals but recognizes the difference between the sovereigns and the citizens by permitting sovereigns to sue each other in the United States Supreme Court, and the Supreme Court was dealing with questions between sovereigns when it decided the case above quoted. But there is no doubt that railroad operation and ownership is a form of commerce, and still North Carolina was exempt from suit on account of a debt growing out of construction and control of a railroad by it. Christian vs. A. & N. R. R. Co., 133 U. S., supra, and such were the cases of R. R. Co. vs. Alabama, 101 U. S., 832, and R. R. Co. vs. Tennessee, 101 U. S., 337.

Arkansas engaged in the banking business which surely is commerce. This was held not to give the right of suit and while the right existed at date of contract the legislature repealed the right after suit brought and this was sustained as not impairing the obligations of the contract. See Beers vs. 61, U. S., 527.

There is another position emphasized by the appellees to wit: That the commission is a *trustee* of the fund in their hands and can be litigated with, without the *cestui que* trust being before the Court. There are certain trustees, such as executors, administrators and trustees of express trusts who can sue for the possession of, or be sued for the possession of trust property without joining the *cestius que trust* with them in a certain class of suits and where a trust is created in a party and it is attacked by one interested in defeating, not claiming an interest under it, but claiming in antagonism to it, the trustee represents the entire interest to the extent that he can be sued alone to set the deed aside. But where the suit is to *enforce the trust* and especially where there are antagonistic interests amongst the *cestius que trust* all parties having an interest in the trust fund must be made parties. The rule is well stated in Vetterlein vs. Barnes, 124 U. S., page 172, in the following language:

"The general rule undoubtedly is that all persons materially interested in the result of a suit ought to be made parties so that the Court may finally determine the controversy, and do complete justice by adjudging all the parties involved in it. Story vs. Livingston, 38 U. S., 13 Pet. 359, 375, (10:200, 208); Shields vs. Barrow, 58 U. S. 17 How. 130, 139, (15:158, 160). But in a suit brought against a trustee by a stranger, for the purpose of defeating the trust altogether, the beneficiaries are not necessary parties, if the trustee has such powers or is under such obligations, with respect to the execution of the trust, that "those for whom he holds will be bound by what is done against him, as well as by what is done by him." In such cases of representation by trustees, the beneficiaries will be bound by the judgment, "unless it is impeached for fraud or collusion between him and the adverse party." Kerrison vs.

Stewart, 93 U. S. 155, 160 (23:843, 845).

In Sears vs. Hardy, 120 Mass. 529, the Court, after observing that who shall be made parties to a suit in equity cannot always be determined by definite rules, but rests to some degree in the discretion of the Court, said: "Generally speaking, however, to a suit against trustees to enforce the execution of a trust, *cestuis que trust, claiming present interests directly op-*
93 *posed to those of the plaintiff, should be made parties, in order that they may have the opportunity themselves to defend their rights, and not be obliged to rely upon the defense made by the trustees, or to resort to a subsequent suit against the trustees or the plaintiff, or to take the risk of being bound by a decree rendered in their absence.*" But the rule is different where the claim of the plaintiff antedates the creation of the trust, and the suit is brought *not in recognition or furtherance of*
94 *the trust, but in hostility to it, as fraudulent and void.* In Rogers vs. Rogers, 3 page, 379, (which was a suit by a judgment creditor to set aside as fraudulent an assignment by the debtor of his personal estate in trust for the payment of a debt to a particular bank, and to pay the residue of the proceeds thereof to other creditors of the assignor) it was objected, at the hearing, that the bank was not made a party defendant. The objection was held to be untenable,
95 the chancellor observing: "As a general rule, the *cestui que trust, as well as the trustee, must be parties, especially where the object is to enforce a claim consistent with the validity of the trust.* But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same, on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee,
96 who is the holder of the legal estate in the property, without joining the *cestui que trust.*" Wakeman vs. Grover, 4 page, 33; Irwin vs. Keen, 3 Whart. 344, 355; Therasson vs. Hickok, 37 Vt. 464; Hunt vs.

Weiner, 39 Ark. 70; Winslow vs. Minnesota & P. R. Co., 4 Minn. 316; Tucker vs. Zimmerman, 61 Ga. 601."

This rule applies here. If the trust theory is correct, Appellees are claiming under the trust, sueing to enforce it and represent an interest antagonistic to the State which is also a *cestui que trust*, entitled to be heard as to any judgment for Appellees which will affect the amount of its judgment. 97

In answer to the position taken so often by counsel that where it is impossible to make an interested party a party to the suit without ousting the jurisdiction this Court will proceed without such party. We cite Gregory vs. Stetson, 133 U. S., p. 586:

"We are of opinion that the decree of the court below must stand. The rule as to who shall be made parties to a suit in equity is thus stated in 98
Story's Eq. Pl., sec. 72: "It is a general rule in equity (subject to certain exceptions, which will hereafter be noticed,) that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between 99
the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly cerain that no injustice is done, either to the parties before it or to others, who are interested in the subject matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not 100
brought out upon the pleadings by the original parties thereto." See also 1 Daniell's Co. Pl. and Pr.

246 et. seq.

In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actively or constructively before it. This principle is fundamental.
101 The allegations of the bill show that the contract sued was made and entered into subsequently to the termination of the proceedings before the referee. By the terms of that contract the note in dispute between Mrs. Pike and the complainant was to be held by the bailee, Stetson, "subject to the joint order and direction" of their respective attorneys. It seems too plain to require argument that complainant Gregory, Mrs. Pike, Talbot, Brooks and Stetson
102 all had an interest in the subject matter of the contract—such an interest, too, as brings the case within the rule just announced.

The point was made in the court below, and it is also pressed here, that Mrs. Pike *being a nonsresident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was therefore unnecessary to attempt to do so.* The court below ruled against the complainant on this point,
103 and we see no error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that, *notwithstanding the Statute referred to and the 47th Equity Rule, a circuit court can make no decree in a suit in the adsence of a party whose rights must necessarily be affected thereby.* Shields vs. Barrow, 58 U. S. 17 How. 130, 141, 142 (15; 158, 162); Coiron vs Millauden, 60 U. S. 16 How. 114, 112 (15; 575), and
104 cases there cited."

We cite also case of California vs. Southern Pa-

cific Railroad Company, 157 U. S., p. 249:

"And Mr. Justice Curtis added: "It remains true notwithstanding the Act of Congress and the 47th Rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot done between the parties to the suit without affecting those rights."

105

Mr. Daniell thus lays down the general rule: "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject, ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought by service upon them of a copy of the bill, or notice of the decree to have an opportunity afforded of making themselves active parties in the cause, if they should think fit." 1 Dan. Ch. Pl. and Pr. (4th Am. ed.) 190.

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Sitting as a court of equity we cannot, in the light of these well-settled principles, escape the consideration of the question whether other persons who have an immediate interest in resisting the demand of complainant are not indispensable parties or, at least, so far necessary that the canse should not go on in their absence. Can the court proceed to a decree as between the State and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?"

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We cite also West vs. Randall, 2 Mason's Reports, 181. Printed as a note in the Lawyers' Co-operative Edition of U. S. Supreme Court to the case of Wormley vs. Wormley, 8th Wheat. 451:

"It is a general rule in equity that all persons materially interested, either as plaintiffs or defendants, in the subject matter of the bill, ought to be made parties to the suit, however numerous they may be.
109 The reason is, that the Court may be enabled to make a complete decree between the parties, may prevent future litigation, by taking away the necessity of a multiplicity of suits, and may make it perfectly certain that no injustice shall be done, either to the parties before the Court, or to others who are interested by a decree, that may be grounded upon a partial view only of the real merits."

110 We cite also Mallow vs. Hinde, 12th Wheat., p. 198, which is expressly approved by this Court. Cal. vs. Su. Pac. R. Co., supra.

"In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without
111 directly affecting and prejudicing the rights of others not made parties."

"We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court.

112 "We have no doubt the Circuit Court had jurisdiction between the complainants and the defendant,

Hinde, so far as to entertain the bill, and grant an injuction against the judgments at law, until the matter could be heard in equity."

This case was interpreted and approved in California vs. Sou. Pac. R. R. Co., 157 U. S., 249, in the following language:

"It was held in Mallow vs. Hinde, 25 U. S. 12 Wheat., 193 (6:599), that where an equity cause 113
may be finally decided between the parties litigant without bringing others before the Court who would, generally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court if its process cannot reach them or if they are citizens of another state; but if the rights of those not before the court *are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the rights of the absent parties, the* 114
peculiar constitution of the Circuit Court forms no ground for dispensing with such parties. And the Court remarked: "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity whatever may be their structure as to jusisdiction. *We put it upon the ground that no court can adjudicate directly upon a person's right without the party being actually or constructively before the court.*"

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This certainly fits the case here. The interest of the State in the fund is so "inseparably connected with the claims of the parties litigant that a final decision cannot be made between them without affecting the rights of the absent parties," to wit: the State. Then the State must be here and her presence cannot be dispensed with.

The decisions of this court point unmistakably to the fact thet the State of South Carolina is a neces- 116
sasy party. One set of Appellees counsel avoid it by

saying she cannot be reached by process hence she can be dispensed. This is untenable. The other set say that she is before the court constructively, thus admitting that the court is proceeding in a case against the State which is equally untenable.

She is either before the court court or not before it. If before the court, the jurisdiction is ousted. If not before it, the court cannot proceed for want
117 of a necessary party. The judgment should therefore be reversed.

W. F. Stevenson,
D. S. Matheson,
Attorneys for Appellants in Reply.

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FILED.
FEB 18 1909
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 625.

W. J. MURRAY, JOHN McSWEEN, AND AVERY PATTON, CONSTITUTING THE STATE DISPENSARY COMMISSION OF SOUTH CAROLINA, ET AL, *PETITIONERS,*

versus

WILSON DISTILLING COMPANY, ET AL, AND THE FLEISCHMAN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.
(21,421).

ARGUMENT ON BEHALF OF THE RESPONDENTS, SUBMITTED BY T. MOULTRIE MORDECAI, FRANK CARTER, SIMEON HYDE, AND H. C. CHEDESTER.

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STATEMENT OF FACTS.

In the year 1892 the General Assembly of South Carolina passed a Statute withdrawing from all its citizens the right to manufacture, sell, or otherwise deal in intoxicating liquors of all kinds, and undertook the conduct and management of the business itself, under a system known as the "State Dispensary." (Page 331, Transcript of Record.)

By that Act, a Board of Control was established, consisting of the Governor, the Comptroller General and the Attorney General. To this Board was committed the duty and

upon it was placed the responsibility of the conduct and management of the liquor business in South Carolina.

It is not necessary to recite this Act more fully. The purpose in referring to it is simply to state the composition of the Board which, at that time, was vested with the powers mentioned.

(Vol. 21, Statutes, page 62.)

It may be of importance to mention here that in the inception of this system the sum of fifty thousand dollars was appropriated by the State to constitute the first capital of the Institution, which amount has long since been repaid to the State, and no further appropriation has at any time since been made. (Page 332, Transcript.)

In the year 1896, Vol. 22, page 124, the constitution of the State Board of Control was changed so that it would consist thereafter of five members, to be elected by the General Assembly; each of these members was required to give a bond of ten thousand dollars, and the entire liquor business was to be conducted and controlled by them. (See Transcript, page 332.)

They were to furnish liquors for sale to the County Dispensers, who were to remit the net proceeds of such sale to the State Treasurer. The bills for the purchases of liquor were to be paid by the State Treasurer, upon warrants drawn by the Commissioner, who was to be elected by the State Board of Control. (Same page of Transcript.)

So the law stood until 1907 and it will readily be seen that the tendency was steadily towards the surrender on the part of the State of the management of the business and control of the affairs of the State Dispensary.

In that year, 1907 (see pages 89 and 333), the General Assembly passed a Statute entitled "An Act to Declare the Law in reference to and to regulate the Manufacture, Sale, Use, Consumption, Possession, Transportation and Disposition of Alcoholic Liquors and Beverages within the State and to Police the same." By the 47th Section of this Statute "the State Dispensary is hereby Abolished," and "all Acts and parts of Acts inconsistent with this Act are hereby repealed."

Taking this section in connection with the history of the Dispensary Law and the management of the dispensary as hereinbefore stated, it appears that it was the legislative purpose and intention to sever the State Dispensary from the State and to be done with it.

Possibly some history of the Dispensary and an investigation of its affairs and the scandals to which it had given rise, and the alleged corruption of which it had been the center, supplied the reason for this legislative action, and it is written in the statutes of the States and the proceedings before this Court that the State had reached a point when its connection with the State Dispensary, as such, was to cease and determine.

The statute last cited was approved on the 16th day of February, 1907, (pages 89 and 322). At the same session of the Legislature by an Act approved on the same day, entitled "An Act to provide for the Disposition of all Property connected with the State Dispensary and to wind up its affairs," (pages 89 and 332), a commission was created, to consist of five members and to be appointed by the Governor, to be known as The State Dispensary Commission.

Each of the members was required to give bond in the sum of $10,000. After providing how the commission should organize it is given authority, and it is made its duty, "to close out the entire business and property of the State Dispensary except real estate, and out of the proceeds of such sales and from the collection of debts due the dispensary the commissioners are to pay all just liabilities at the earliest date practicable, and shall have the power to make such disposition of the stock on hand as their judgment may dictate," with certain other provisions which it is not necessary to recite.

Realizing that after the payment of the debts of the institution there would probably be a balance remaining in the State Treasury, the result of the remittances made by the county dispensaries under the former law, it is provided in Section 5, of this last named Act, "the said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act,

all surplus funds on hand after paying all liabilities."

The commission proceeded to sell all of the property except the real estate and to collect all assets due the State Dispensary, but having failed to pay out of the proceeds of such sales and collections the debts due to the complainants and others, these proceedings were filed.

A brief statement of the pleadings is necessary. (Pages 2-17 and 245, Transcript.)

In the Wilson proceeding, after the formal allegations and the allegation of the indebtedness, by reason of sales made to the State Dispensary (see folios 2-6 of the record) it is alleged, in the language of the Statute last referred to, that "it was the duty of the commission to close out the entire business and property," etc., and "to pay all the just liabilities of the Dispensary." A further allegation is that the commission had realized upon these assets, but had failed and refused to pay complainant's debt, alleging that the assets were not sufficient to pay all of the debts of the Dispensary, and it is particularly alleged that the Commission proposes and will, unless restrained by order of the Court, put the funds in their hands into the State Treasury, thus depriving the complainants of their rights in the premises.

The answer to this complaint, after denying the allegations last above referred to, raised the questions that the commission constituted a court, and that this court is without jurisdiction to control or restrain their action, and also that they, the commission, are officers of the State and that this action is to all intents and purposes a suit against the State, and that the State is an indispensable party.

The complaint in the Fleischman case alleged at greater length practically the same conditions as in the Wilson case. It is not necessary to abstract them, further than to say that reliance is placed upon the same Section of the Winding Up Statute as is referred to in the Wilson case.

The answer in the Fleischman case, so far as the present hearing is concerned, raises the same questions, but with more particularly as to the position taken that the com-

mission constituted a court in that it is alleged at folio 68, that "to restrain the action of the commission by the issuance of the injunction prayed for, would be in violation of Section 720 of the Revised Statutes of the United States."

The Circuit Judge issued a temporary injunction and rule to show cause, which was made permanent by his decree, dated March 3, 1908 (see Record, folios 33, 143, 243, 301, et seq).

The Legislature of South Carolina, on February 24, 1908, passed an Act directing the State Dispensary Commissioners to pay out of any funds in its hands from the profit or business of the State Dispensary, fifteen thousand dollars ($15,000.00), into the State Treasury, to be used for the purposes mentioned in the Act. The commissioners having refused to pay this amount because of the Restraining Order issued in this proceeding by Judge Pritchard, on March 4, 1908, a proceeding was instituted in the Supreme Court of South Carolina by the Attorney General of the State, seeking to compel the payment of this money by mandamus directed to the commissioners. The commissioners showed for cause why the writ should not issue, the pendency of this proceeding in the Circuit Court, and that they were restrained by the order therein from paying out the funds, attaching to their answer a copy of the Bills and of the Restraining Order.

Thereupon the Supreme Court of South Carolina, upon the coming in of the Return and after argument, held that the suits in the Circuit Court were suits against the State and that the State was an indispensable and necessary party and the Act of February 16, 1907, set out in the petitioner's brief, did not create a trust and that the funds in the custody of the Commissioners were the property of the State, and in the hands of the commissioners as the agents of the State, and subject to legislative control under appropriation, and that the order of the Circuit Court in these proceedings was void, as the Court was without jurisdiction in the premises and that there was no reason why the mandamus should not issue. (See pages 280, et seq.)

Upon appeal to the Circuit Court of Appeals for the

Fourth Circuit, from the order of injunction, and appointing receivers, granted by the Circuit Judge as above stated, and after hearing full argument, that Court sustained the judgment of the Circuit Court and remanded the case for further proceedings in accordance with the views therein expressed. (Folios 331, et seq.)

The points decided were:

First: That the suits in the Circuit Court were not suits against the State.

Second: That the State was not an indispensable party.

Third: That the Winding-up Commission created by the Act of 1907 did not constitute a court, and the Court held, therefore, that the Decree of the Circuit Court appealed from should be affirmed and the case remanded for such further proceedings as might be in accordance with the terms expressed in the opinion.

Thereafter, by orders of the Presiding Judge of the Circuit Court of Appeals (see pages 375-376 of the record), the mandate in this cause was stayed so that the matter might be brought before this Court on certiorari. Petition for certiorari was subsequently filed and the Court having granted the same, the record has now been certified to this Court.

The errors assigned in the petition for certiorari, found at pages 11 and 12 of the petition, are as follows:

1. In holding that the suits were not suits against the State in violation of the provisions of the Eleventh Amendment to the Constitution.

2. In holding that the State was not a necessary and an indispensable party to said suits.

3. In holding that the Circuit Court had jurisdiction of said causes.

4. In holding that the Act of February 16, 1907, created an irrevocable trust which could be enforced and executed by said Circuit Court.

5. In not holding that there was no equity in said bills, and no cause or necessity shown for the grant of an injunction or the appointment of receivers.

6. In not reversing the order and decree granting an injunction and appointing receivers.

7. In not directing a dismissal of the bills and each of them.

ARGUMENT.

FIRST.

These are not suits against the State.

The first question to be discussed is as follows: Did the Circuit Court of Appeals err in holding that the suits were not suits against the State and within the provisions of the 11th amendment to the Constitution?

Upon this proposition we submit the following discussion with the authorities applicable thereto:

In this connection it is proper to remark, first, that the attempt is not made here in any way to frustrate the purpose of the State in passing the legislation under discussion, nor to force the officers in charge of the fund, whatever may be their relation to the State, to do any act not contemplated by the Statutes. The decisions cited in support of the conflicting view upon the question now being discussed, while apparently opposed, are easily reconcilable when it is remembered that in one class of cases the effort was made to force certain officers to do what they were commanded by Statute not to do, and in the other class of cases the purpose was to have carried out, through the agencies therein provided, that which the Statute enjoined and required.

It is to this latter class of cases that the proceedings, now before this Court, belong and this position is fully justified by an examination of the pleadings in the case.

After reciting the provisions of the Statute and the debts incurred and the failure to pay the debts the complaints in both cases allege that the debt is justly due, and in the Fleischman case the allegation is made at length, and with

great particularity, that the claim has been passed upon by the commission, that the amounts allowed are practically correct, and that notwithstanding this ascertainment as to the justness of the claim and the validity of the obligation, the defendants refuse to pay it.

In other words, if there be any duty imposed upon the commission of a quasi judicial nature, involving any discretion, they have already exercised it, and to that extent, that is to the extent of its duty to the State, has performed it, and the only other duty remaining undone is the duty to the complainants and it is to enforce the performance of that duty to the complainants, the State thus being out of the question, the duty to it having been performed, that these proceedings are brought. Such being the case, the authorities to which we shall hereafter refer, and which are referred to fully in the decision by the Supreme Court of South Carolina, and the Circuit Court of Appeals, and which need not all be referred to here, apply, to the effect that the State is not an indispensable party in such a proceeding, and that the Court has jurisdiction to proceed without it.

The two cases most often cited in support of the several positions taken by the respective parties, are *Louisiana v. Jumel*, 107 U. S., 711, *and Rolston v. Missouri*, 120 U. S., 390.

The decision in the Jumel case was based upon the fact that an ordinance forbade the payment of certain interest and withdrew from the officers of the State the means of carrying her contract into effect, and that the execution of the contract can not be enforced, nor the relief sought be awarded, in a suit to which she is not a party, but which is brought against the officers who are merely obeying the positive orders of the supreme political power of the State.

On the other hand, in the Rolston case, the Court said:

> "The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made the trustees are entitled to

their decree; if it has not, a decree in their favor, as the case now stands, must be denied, but as the parties are all before the Court and the suit is in equity, it may be restrained so as to determine what the trustees must do in order to fulfil the law, and under what circumstances the Governor can be compelled to execute the assignment which has been provided for."

The same principle is laid down in many other cases cited in the decree below.

First of all, the case of *Osborne against the United States Bank*, 9 *Wheaton*, 739. In that case the suit was against the officer and was sustained for the very reason that the State could not be made a party under the Eleventh Amendment.

Here the subject matter was notes and money wrongfully withheld, and it was held that the prohibition of the Eleventh Amendment does not extend to cases where the State is not a party on the record, though it may have an ultimate interest in the subject matter.

Referring again to the issues raised in these proceedings and the condition in which the matter is before the Court, so that with reference to these claims there is no exercise of discretion required on the part of defendant, we cite the "*Board of Liquidation against McComb*," 92 U. S., 531, where it was held that, "although a State without its consent can not be sued by an individual; nor can a Court substitute its own discretion for that of the executive officers in matters belonging to their proper jurisdiction, yet when a plain official duty requiring no exercise of discretion is to be performed, and the performance is refused, any person who will sustain injury by such refusal, may have a *mandamus* to compel its performance."

Again, it must be distinctly borne in mind throughout this discussion that the purpose of both proceedings now before the Court was principally to prevent the distribution of the funds without discharging the plain obligation to the plaintiffs, due them from the commission, and this was not seeking to defeat the purpose of the statutes, but rather to carry out that purpose fully and expeditiously and fairly.

Pennoyer against McConnaughy, 140 U. S., 1: In this case the plaintiff had certain contract rights from the State which were threatened to be invaded by the Land Commissioner, an officer of the State, having in charge all land interests of the State, under an Act which was claimed to be unconstitutional, and the question was raised that the suit was really against the State although nominally against the land agent, and the Court held that it was not; but that it might proceed against the Land Commissioner.

In the opinion Mr. Justice Lamar divides the cases in which this question has arisen into two classes, the first of which, "is where the suit is brought against the officers of the State as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts," and the other class "is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under contract with the State."

> "Such suit, whether brought to recover money or property in the hands of such defendant, unlawfully taken by them in behalf of the State, or for compensation in damages, or in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not, within the meaning of the Eleventh Amendment, an action against the State."

Citing *Osborne vs. the Bank*, 9 *Wheaton*, 738; *Davis vs. Gray*, 16 *Wallace*, 203; *Tomlinson vs. Branch*, 15 *Wallace*, 460; *Litchfield vs. Webster County*, 101 U. S., 773; *Allen vs. Baltimore, etc., R. R.*, 114 *U. S.*, 311; *Board Liquidation vs. McComb*, 92 *U. S.*, 531; *Poindexter vs. Greenhow*, 114 U. S., 270.

Many of these authorities are cited in the later cases and are also cited in the opinion of the Supreme Court of South Carolina, and of the Circuit Judge, and the principle runs all through them, that where the purpose of the proceeding runs

along with the purpose of the State (as shown in its legislation), mandamus, or injunction, as the case may be, will lie to enforce a right or prevent a wrong, and that such proceeding will lie against the officer whose duty it is, under a statute, to do the thing required, or not to do the thing sought to be enjoined.

It will serve no good purpose to prolong the discussion quoting at length all of these authorities, familiar to the Court, and recently made very familiar to counsel by reason of the repeated discussion of these questions, and we shall refer only to a few more.

The case of *Tindall v. Wesley, in* 167 U. S., quoted in the opinion below, is precisely in point, even taking in view that the property in question in this case is the property of the State, strictly speaking.

Wesley, the plaintiff, claimed to be the owner of certain real estate in the city of Columbia, which was also claimed by South Carolina as its property, and was in the custody of the Secretary of State of South Carolina, who, by law, is the custodian of all State property.

The actual possession of the real estate in question was in another who was simply a watchman under the Secretary of State. Both defendants disclaimed any personal interest in the property, and averred that the title and right of possession were in the State. In that case the question was distinctly raised that the suit was against the State within the meaning of the Eleventh Amendment; and it was held that it was not a suit against the State, but simply an action to recover against those who were in possession of the property; and it was held that the Eleventh Amendment gave no immunity to officers or agents of States, in withholding the property of a citizen without authority of law, and when such officers or agents assert that they are in rightful possession, they must make that assertion good upon it appearing, in a suit against them as individuals, that the legal title and right of possession are in the plaintiff.

In this case special reference is made to the case of *United States v. Lee*, 106 U. S., 218, and it is stated that the same principles apply as are enforced in cases in which the United States is a party.

In the latter case the doctrine that, except where Congress has provided, the United States cannot be sued, was reaffirmed, but it is held that it had no application to officers and agents of the United States, who, as such, holding for public uses possession of property, are sued therefor by a person claiming to be the owner thereof, or entitled thereto; but the lawfulness of that possession, and the right or title of the United States to the property, may, by a Court of competent jurisdiction, be the subject matter of inquiry, and be adjudicated accordingly.

Here, again, many authorities are cited in support of the decision, and the same distinction clearly drawn.

Bearing in mind that the position we take is that these proceedings seek to require the performance of statutory duties enjoined upon the commission, by injunction, that the fund may be kept intact for the purpose of carrying out the statute, the case last cited is very strong.

Said the Court:

> "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of citizens, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, *to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.* The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties

setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion."

And because it contains a history of the judicial interpretation and application of the Eleventh Amendment we refer particularly and at length, for facility of reference to the many authorities therein cited, to the following very recent case:

In the Matter of Edward T. Young, Petitioner on Petition for Writ of Habeas Corpus and Certiorari.

(*Decided March 23, 1908.*)

In that case the State of Minnesota had passed a law imposing penalties upon railroad corporations and officers for violating certain freight rates, so severe that the Court declared the regulations violative of the provisions of the Constitution of the United States, guaranteeing the equal protection of the laws. Pending the proceedings, a temporary injunction was served upon certain officers of the State, restraining them from attempting to enforce the law in question. This temporary injunction was served upon the attorney general of the State, among others, and he appeared specially to move to set it aside, upon the ground that the Court had no jurisdiction over him as attorney general, and that the suit was in reality against the State of Minnesota, which had not given its consent to such proceeding, and that, therefore, the Court was without jurisdiction.

The attorney general also demurred to the bill on the same grounds. The Court overruled the motion and demurrer, and subquently granted a preliminary injunction. The attorney general, notwithstanding the injunction, proceeded to enforce the law, and was fined for a contempt.

The matter then came before the Supreme Court of the United States on an application for habeas corpus and writ of *certiorari*.

Mr. Justice Peckham delivered the opinion of the Court and

reviewed all the authorities on the questions, whether this was a proceeding against the State prohibited by the Eleventh Amendment.

The petitions were dismissed—the Court holding, among other things, as follows:

> "The case before the Circuit Court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant. It applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. *Hens v. Louisiana*, 134 *U. S.*, 1. It was adopted after the decision of this Court in *Chisolm v. Georgia*, 2 *Dall.*, 419 (A. D. 1793), where it was held that a State might be sued by a citizen of another State. Since that time there have been many cases decided in this Court involving the Eleventh Amendment among them being *Osborne v. United States Bank*, 9 *Wheat.*, 738, 846, 857 (A. D. 1824), which held that the Amendment applied only to those suits in which the State was a party on the record.
>
> "In the subsequent case of *Governor of Georgia v. Madrazo*, 1 *Pet.*, 110, 122, 123 (A. D. 1828), that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the Court, while citing *Osborne v. United States Bank*, *supra*, said that where the claim was made, as in the case then before the Court, against the Governor of Georgia as Governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the State, and for slaves in

possession of the State government), the State might be considered as a party on the record (p. 123), and therefore the suit could not be maintained.

"*Davis v. Gray*, 16 *Wall.*, 203, 220, reiterates the rule of *Osborne v. United States Bank*, so far as concerns the right to enjoin a State officer from executing a State law in conflict with the Constitution or a Statute of the United States, when such execution will violate the rights of the complainant.

"In *Virginia Coupon Cases*, 114 U. S., 270, 296, (Poindexter v. Greenhow), it was adjudged that a suit against a tax collector who had refused coupons in payment of taxes, and, under color of a void law, was about to seize and sell the property of a tax payer for non-payment of his taxes, was a suit against him personally as a wrongdoer, and not against the State.

"'*Hagood v. Southern*, 117 U. S., 52-67, decided that the bill was in substance a bill for the specific performance of a contract between the complainants and the State of South Carolina, and although the State was not in name made a party defendant, yet, being the actual party to the alleged contract, the performance of which was sought, and the only party by whom it could be performed, the State was, in effect, a party to the suit, and it could not be maintained for that reason. The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State.'

"The cases upon the subject were reviewed, and it was held, *in re Ayers*, 123 U. S., 443, that a bill in equty brought against officers of a State, who, as individuals, have no personal interest in the subject matter of the suit, and defend only as representing the State, where the relief prayed for, if done, would constitute a performance by the State, of the alleged contract of the State, was a suit against the State (page 504), following in this respect *Hagood v. Southern*, *supra*.

"A suit of such nature was simply an attempt to make the State itself, through its officers, perform its alleged

contract, by directing those officers to do acts which constitute such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State.

"On the other hand, *United States v. Lee*, 106 U. S., 196, determined that an individual in possession of real estate under the government of the United States, which claimed to be its owner, was, nevertheless, properly sued by the plaintiff, as owner, to recover possession, and such suit was not one against the United States, although the individual in possession justified such possession under its authority. See, also *Tindal v. Wesley*, 167 U. S., 204, to the same effect.

"In *Pennoyer v. McConnaughy*, 140 U. S., 1, 9, a suit against land commissioners of the State was said not to be against the State, although the complainants sought to restrain the defendants, officials of the State, from violating, under an unconstitutional act, the complainant's contract with the State, and thereby working irreparable damage to the property rights of the complainants. *Osborne v. United States Bank, supra*, was cited, and it was stated: 'But the general doctrine of Osborne v. Bank of the United States, that the Circuit Courts of the United States will restrain a State officer from executing an unconstitutional Statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from.' The same principle is decided in *Scott v. Donald*, 165 U. S., 58-67. And see *Missouri, etc., v. Missouri Railroad Commissioners*, 183 U. S., 53.

"The cases above cited do not include one exactly like this under discussion. They serve to illustrate the principles upon which many cases have been decided. We have not cited all the cases, as we have not thought it necessary. But the injunction asked for in the *Ayers* case, 123 U. S. (supra), was to restrain the State officers from commencing suits under the act of May 12,

1887 (alleged to be unconstitutional), in the name of the State, and brought to *recover taxes for its use*, on the ground that if such suits were commenced they would be a breach of a contract with the State. The injunction was declared illegal because the suit itself would not be entertained as it was one against the State to enforce its alleged contract. It was said, however, that if the Court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits. (Page 487.) It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property.

"Whether the commencement of a suit could ever be regarded as an actionable injury to another, equivalent in some cases to a trespass, such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362 (a rate case), was a suit against the members of a railroad commission (created under an act of the State of Texas), and the Attorney General, all of whom were held suable, and that such suit was not one against the State. The commission was enjoined from enforcing the rates it had established under the act, and the Attorney General was enjoined from instituting suits to recover penalties for failing to conform to the rates fixed by the commission under such act. It is true the statute in that case, creating the board, provided that suit might be maintained by any dissatisfied railroad company, or other party in interest, in a Court of competent jurisdiction in Travis County, Texas, against the commission as defendant. This Court held that such language permitted a suit in the United States Circuit Court for Western District of Texas, which embraced Travis County, but it also held that, irrespective of that consent, the suit was not in effect a suit against the State (although the Attorney General was enjoined), and, therefore, not prohibited under the amendment. It was said, in the opinion, which was delivered by Mr. Justice

Brewer, that the suit could not in any fair sense be considered a suit against the State (page 392), and the conclusion of the Court was that the objection to the jurisdiction of the Circuit Court was not tenable whether that jurisdiction was rested (page 393), 'upon the provisions of the Statute, or upon the general jurisdiction of the Court existing by virtue of the statutes of Congress and the sanction of the Constitution of the United States.' Each of these grounds is effective, and both are of equal force. *Union Pacific, etc., v. Mason Company*, 199 U. S., 163-166.

"In *Smyth v. Ames*, 169 U. S., 466 (another rate case), it was again held that a suit against individuals, for the purpose of preventing them as officers of the State from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment to the injury of the rights of the plaintiff, was not a suit against a State within the meaning of the amendment. At page 518, in answer to the objection that the suit was really against the State, it was said: 'It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them, as officers of a State, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment.' The suit was to enjoin the enforcement of a statute of Nebraska because it was alleged to be unconstitutional, on account of the rate being too low to afford some compensation to the company, and contrary, therefore, to the Fourteenth Amendment."

"There was no special provision in the statute as to rates, making it the duty of the Attorney General to enforce it, but under his general powers he had authority to ask for a mandamus to enforce such or any other law. *State of Nebraska ex rel., etc., v. The Fremont, etc., Railroad Co., 22 Neb.*, 313.

"The final decree enjoined the Attorney General from bringing any suit (page 477) by way of injunction, mandamus, civil action or indictment, for the purpose of en-

forcing the provisions of the act. The fifth section of the act provided that an action might be brought by a railroad company in the Supreme Court of the State of Nebraska; but this Court did not base its decision on that section when it held that a suit of the nature of that before it was not a suit against a State, although brought against individual State officers for the purpose of enjoining the mfrom enforcing, either by civil proceeding or indictment, an unconstitutional enactment to the injury of the plaintiff's right. (Page 518.)

"This decision was reaffirmed in Prout v. Starr, 188 U. S., 537, 542.

"Attention is also directed to the case of *Missouri, etc., Ry. Co. v. Missouri R. R., etc., Commissioners*, 283 U. S., 53. That was a suit brought in a State Court of Missouri by the railroad commissioners of the State, who had the powers granted them by the statutes set forth in the report. Their suit was against the railroad company to compel it to discontinue certain charges it was making for crossing the Boonville bridge over the Missouri river. The defendant sought to remove the case to the Federal Court, which the plaintiffs resisted, and the State Court refused to remove on the ground that the real plaintiff was the State of Missouri, and it was proper to go behind the face of the record to determine that fact. In regular manner the case came here, and this Court held that the State was not the real party plaintiff, and the case had, therefore, been properly removed from the State Court, whose judgment was thereupon reversed.

"Applying the same principles of construction to the removal Act which had been applied to the Eleventh Amendment, it was said by this Court that the State might be the real party plaintiff when the relief sought enures to it alone, and in whose favor the judgment or decree, if for the plaintiff, will effectively operate.

"Although the case is one arising under the removal act and does not involve the Eleventh Amendment, it, nevertheless, illustrates the question now before us, and

reiterates the doctrine that the State is not a party to a suit simply because the State railroad commission is such party.

"The doctrine of *Smyth v. Ames* is also referred to and reiterated in *Gunter, Attorney General, v. Atlantic, etc., Railroad Co.*, 200 U. S., 273, 283. See also *McNeill v. Southern Railway*, 202 U. S., 443, 539; *Mississippi Railroad Commission v. Illinois, etc., Railroad Co.*, 203 U. S., 335, 340.

"The authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action."

THE STATE COURT DECISION.

(See page 280 of Transcript.)

As incidental to this question, we take up now the discussion of the question whether the United States Courts are bound in this proceeding to follow the decision of the State Supreme Court rendered in a case instituted after this proceeding was begun, and after the questions involved had been passed upon by the United States Circuit Court in such proceeding.

In considering this question when presented to him, Judge Pritchard, at page 299 of the record, held as follows:

> "The Court having considered the opinion of the Supreme Court of South Carolina, which holds that this is a suit against the State, and therefore inhibited by the Eleventh Amendment, is of the opinion that this Court is not bound by the principles enunciated therein, inasmuch as it was rendered subsequent to the decision of this Court, and necessarily involves a construction of

the Constitution of the United States," and this position was fully sustained by the Circuit Court of Appeals. (Page 372 of Transcript.)

In this connection we submit, in addition to this, that the present controversy also involves the construction, or at least the determination of the question as to what constitutes a Court under Section 720 of the Revised Statutes of the United States, so that there are practically two Federal questions involved, besides the construction of the State statute.

The Circuit Judge relied upon two leading authorities, one of which is *Burgess against Seligman*, 107 U. S., page 33, from which he quotes as follows:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the Statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal Courts are co-ordinate with, and not subordinate to, the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. * * * So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. * * *

"In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the Statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the Federal Court was to wait for the State Courts to de-

> cide the merits of the controversy, and then simply register their decision; or that the judgment of the Circuit Court should be reversed, merely because the State Court has since adopted a different view."

And also the case *of Pease against Peck*, 18 Rwy., 599, where the Court says:

> "When the decisions of the State Court are not consistent we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist, also, when a cause is got up in a State Court for the very purpose of anticipating our decision of a question known to be pending in this Court. Nor do we feel bound in any case in which a point is first raised in the Courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of the State."

The case in 107 U. S. has been followed by a very large number of cases, both in the Circuit Courts and the Supreme Court, and some of the latter decisions will be referred to.

In *Louisville & Nashville R. R. Co. against Palmes*, 109 U. S., p. 244, it was held that the Federal question before the Court is whether the State Court gave effect to a State law which impairs the obligations of a contract; in deciding which, and in determining whether there was a contract, the Court is not necessarily governed by previous decisions of State Courts except where they have been so firmly established as to constitute a rule of property.

Said the Court (page 257):

"It is undoubtedly true that the opinion of the Supreme Court of Florida, in the case of Gonzales v. Sullivan, 16 Fla., 791, is not consistent with that which we have expressed upon some of the principal questions involved in this case. It did declare, speaking of the effect of the Internal Improvement Act of 1855, 'that an exemption from taxation resting in contract is annexed, by the terms of the law which created it, to the road itself, and not to the companies,' and that by the act of 1872 the Pensacola and Louisville Railroad Company, as assignee of the Florida and Alabama Railroad, became entitled to the exemption, because 'the property passed, and with it, as an incident, went the exemption.'"

In *Buncombe County against Tommey*, 115 U. S., 122, the question arose as to whether a mechanic's lien could be enforced upon railroad property under the Statute law of North Carolina. While the particular Statute had never been finally construed by the Supreme Court of North Carolina, nevertheless, that Court had given construction to it to the extent of a very clear intimation of an opinion, and the Supreme Court said:

"But without accepting as conclusive an opinion delivered after the rights of the parties had become fixed, (*citing Burgess against Seligman, supra*), 'we rest our interpretation of the Statute upon the ground that it has no reference to the work done or materials furnished in the construction of railroads.'"

In another case in the same volume, 115 U. S., *Gibson vs. Lyon, at page* 439, the Court says:

"As a precedent the decision of the Supreme Court of the State, though single, is entitled to peculiar respect because of the questions decided arising upon the local law of the State, but it cannot have conclusive force in the Courts of the United States unless it has become a rule of property."

In Carroll County against Smith, 111 U. S., 557, it was held that: "the decision of the highest Court of a State construing the State's Constitution is not binding upon this Court, as affecting the rights of citizens of other States in litigation here, when it is in conflict with previous decisions of this Court, and when the rights which it affects here were acquired before it was made."

Said the Court:

> "The decision, in *Hawkins v. Carroll County*, above referred to, is not a judgment of the Supreme Court of Mississippi, construing the Constitution and laws of the State, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a decision upon the very bonds here in suit, *pronounced after the controversy arose*, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the Courts of the United States in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those Courts to determine for themselves what is the law of the State by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a Federal tribunal. *Burgess v. Seligman*, 107 U. S., 20, 30."

In Anderson against Santa Anna, 110 U. S., 356, the question arose upon the construction of the laws under which municipal corporations in a State were allowed to incur indebtedness, and it was held "that where bonds were issued under the laws which had not at the time of issue been construed by the highest Court of the State, its subsequent con-

struction by them is not conclusive on Federal Courts, though they will lean to an agreement of views with the State Court."

In this case the decision in the Burgess case, in 107 U. S., was referred to as having summed up all of the authorities up to that time and laid down the rule thus adopted in this case, that the United States Courts will not necessarily follow the decisions of State Courts made after the time of the transaction which is the subject of litigations.

In *Bolles v. Brimfield*, 120 U. S., 759, citing *Anderson v. Santa Anna, supra*, the Court says it adheres to the rule upon the subject of following judgments of State Courts, with the qualification, however, that such doctrines may be announced by the State Court before the rights which are the subject of litigation in the Federal Court accrue.

In *Bucher v. Cheshire R. R. Co.*, 125 U. S., 555, the question arose upon a Statute of the State of Massachusetts providing that a person engaged in traveling on the Sabbath day could not recover against a corporation upon whose road he travels, for personal injury, which had been sustained by the decisions of Massachusetts in a large number of cases which were of sufficiently long standing to establish a rule, so far as they can establish it, and the Supreme Court followed the rule simply for those reasons, and even in this case there was a dissent by Mr. Justice Harlan, in which Mr. Justice Field concurred.

In *German Savings Bank against Franklin County*, 128 U. S., 526, the State law made a certain provision with reference to municipal bonds issued by a county, and the State Courts had construed the law. In passing upon the question, whether the Supreme Court should follow these decisions, the Court says:

> "This interpretation of Section 7, of the Act of April 16th, 1867, accompanied all bonds subsequently issued, into the hands of whoever took them, whether a *bona fide* holder or not, and this Court must recognize this decision of the Supreme Court of Illinois as an authoritative construction of the Statute made *before* the bonds were issued, and to be followed by this Court." Citing

a number of cases in which that principle was sustained.

Thus the principle is again emphasized that where the State law has been construed *before* the transaction occurs, and the parties have acted upon the faith of that decision, then the Supreme Court of the United States will not disturb that construction.

In considering the effect of a construction of a devise, the Supreme Court, in Barker vs. Pittsburg, etc., R. R. Co., 166 U. S., page 83, says:

> "It becomes important, therefore, that the opinion of the Supreme Court of Pennsylvania in the former action of ejectment should be carefully examined and compared with the previous judgments of that Court."

The rule, with reference to following the State Court when its decisions upon a point are numerous and settled, and a rule of property is concerned, is again considered in *Wade v. Travis Co.*, 174 U. S., 499, and to illustrate how faithfully the Supreme Court has adhered to the rule laid down in 107th U. S., and other cases, while a single decision made, *after* a transaction will not always be followed, the rule is applied in a reversed state of the facts, in this, that having followed the Supreme Court of Illinois (20 Howard, 1), in a line of decisions which settled a rule of property, the Supreme Court adhered to that rule, although the Supreme Court of the State had subsequently overruled its own decision, and had given the Act of the Legislature a different construction.

In a very full discussion of the rule in *Warburton v. White*, 176 U. S., 495, the result deduced is that there is no absolutely fixed rule which requires the Supreme Court of the United States to follow the decision of the State Court in considering a State Statute.

It was said that if the acts done were done in pursuance of the construction by the State Court, and such construction had become a fixed rule of action or of property, the United States Court would follow it; but if not, the United States Court would not be relieved of the responsibility of putting its own interpretation upon the Statute.

In *Flanigan v. Sierra County*, 196 U. S., 553, it was held: Whether a Statute of a State is, or is not, a revenue measure, and how rights thereunder are affected by a repealing Statute, depends upon the construction of the Statutes, and where no Federal question exists this Court will lean to an agreement with the State Court.

In that case there was a conflict between the Supreme Court of California and the Circuit Court of Appeals, and the contention was that the conflict did not arise out of the construction of the Statute of the State, but as to the effect of the new Statute, considered by each Court to be a repeal of a prior Statute, upon the rights of the litigants granted under a prior Statute.

The Circuit Court of Appeals first assumed, but did not decide, that the Ordinance may have been a revenue measure, and the Supreme Court of California decided that the Ordinance was a revenue measure.

It was contended that this question did not involve the construction of the Statute; but was merely the determination of a question that depended upon a principle of general law and not upon a positive Statute of the State. This being the contention of counsel, it was further said that: "In such case the Courts of the United States are not required to follow the decision of the State Courts.

The Court declined to adopt this view, and went on to say:

> "If, in any case, we should lean to an agreement with the State Court, this is such a case. There is no Federal right involved. The question is one strictly of the State law, and the power of one of the municipalities of the State under that law. If we should yield to the contention of counsel we should give greater power to one of the municipalities of the State than the law of the State, as construed by the Supreme Court of the State, would give it."

So that even in that case the Court decided that it was not bound to follow the decision of the State Court.

Finally, as showing the attitude of the Supreme Court to

this question, we cite *Yazoo & Miss. Valley R. R. vs. Adams*, 181 U. S., 580.

In that case the question arose upon the construction of the State Statute with reference to the collection of taxes, and that the Supreme Court of Mississippi having decided that all the taxes had accrued after the consolidation of certain roads, and the company had thereby lost its exemption, and as this was the construction of the general tax laws of the State which were complex and difficult of interpretation, this Court would accept that construction and deny the petition for a rehearing.

This is very far from holding that the Court will, in all cases, adopt the construction of the State Statute by the Supreme Court of the State; and in delivering the opinion of the Court Mr. Justice Brown said:

> "Assuming that we may exercise an independent judgment respecting their (Statutes) construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation is a sound one or not. The right asserted depends upon comparison and construction of such Statutes; and the settled rule of this Court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the State Statute which has been adopted by the Court of last resort in that State."
>
> Putting this last rule in comparison with the decisions in the Burgess case, *supra*, and other decisions which we have cited, it would seem that there would be no reason why the decision of the State Court should be followed, where it has been made not only after the rights have accrued, which are the subject of litigation, but also after a contrary interpretation by the Courts of the United States."

SECOND.

The State not a necessary or indispensable party.

The second question submitted in the petition is whether the Circuit Court erred in holding that the State was not a necessary and an indispensable party to said suits.

It is first necessary to enquire what, under the Statute, is the interest of the State in the fund in question.

Under the Act of February 17th, 1907, Section 5, the State reserves, or rather derives, its interest in this fund, as the same is in the hands of the defendants, from the following provision: "Said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand, after paying all liabilities."

It is admitted that the entire liability of the State Dispensary was about six hundred thousand dollars, and that the funds in the hands of the Commissioners amount to about eight hundred thousand dollars. (Pages 48, 49, 50, of Transcript.) It also appears that the fifty thousand dollars originally loaned by the State to the State Dispensary, with which to begin business, has been repaid (Page 332), and that the sum of one hundred and twenty thousand dollars, or thereabouts (page 335), which was in the State Treasury previous to the Act establishing this winding-up commission, was paid to the commission by the State Treasurer.

The language in Section 5, *supra*, is "all surplus" funds on hand, after "paying all liabilities," and as these liabilities could be decreased, the interest of the State would be increased, but to hold that the State was a necessary party because of this condition of affairs would be to hold that the Legislature passed the Act in question with a view not to deal promptly and fairly with the creditors of the Dispensary, but to save as much as possible out of the fund for the State, regardless of its just indebtedness—which cannot be true.

Again, can the Court proceed to final judgment in this case without the State before it as a party? What has it to do? It has to ascertain through its own machinery or through the commission what are just liabilities of the Dispensary. Nothing more, nothing less, and the result or balance, "all surplus funds" after such liabilities are paid, shall belong to the State.

It is clearly a condition in which the State, if it desires to see that this investigation is fairly made, so that it shall

get the most possible out of the fund, should come into the case and be made a party. The State has parted with the entire fund by a declaration of trust executed by Statute to the commissioners. Its interest is purely reversionary, the title being in the commissioners in trust. This is shown by the fact before referred to that the treasurer actually paid to the commission the balance of one hundred and twenty thousand dollars, in his hands at the time of the adoption of the Act. (Page 335.)

Now, then, such being the facts and the reasonable deduction from them, and the state of the case, we refer to the case of *Cunningham against Maine and Brunswick Railroad*, 109 U. S., 446. The chief principle laid down is "that whenever it is clearly seen that a State is an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction."

We observe that there is a total absence in this case of the elements so held to be essential in this decision.

There is no reason whatever why the Court cannot call in all of its creditors, scale their claims, pay what is just, or require the commission so to do, thus enforcing and not denying the terms of the Statute, and leave the balance in the hands of the commission for the appropriation of the same under the terms of the Statute.

The facts upon which the case of *Cunningham* is based are these:

The State had endorsed railroad bonds, taking a lien upon the property as security, and the company failed to pay interest upon the endorsed bonds, whereupon the Governor of the State took possession and put the property in the hands of a receiver, who sold it to the State. The State thus became the actual owner of the property. The State took possession and took up the endorsed bonds, substituting the bonds of the State in their place. The holders of an issue of mortgage bonds issued by the railroad company, subsequently to those endorsed by the State, but before the default in payment of the interest filed a Bill in Equity to foreclose their own mortgage, and set aside the sale, and to be let in as prior in lien.

and for other relief affecting the property—setting forth the above facts; and made the Governor and Treasurer of the State parties.

These officers demurred, and it was held that the facts in the bill showed that the State "is so interested in the property that final relief cannot be granted without making it a party, and the Court is without jurisdiction."

Now, in this case the facts are wholly different, because in the case cited the absolute title to the property was in the State, and an effort was made to foreclose a prior lien. How could the title of the State be divested in a proceeding to which the State was not a party? else the railroad property would have to be sold subject to the title of the State.

In the present case the State has voluntarily declared a trust by the Act of 1907, primarily in favor of the creditors, reserving to itself only such amount as should remain after the creditors have been fully satisfied. The title is by the act of the State transferred to the trustees, and the title can therefore be taken out of these commissioners as trustees in a proceeding to which they are parties, whether the State be a party or not, and if this be so then the Court can administer the fund to the extent, at least, of preventing its waste, and in preserving it for ultimate disposition, according to the terms of the Statute. That is what this proceeding seeks to do.

The payment of the complainant's claims, of course, would follow, but the present purpose is to keep the fund intact until all claims can be called in, and the rights of the State are in no way affected by such proceeding; and if the other view prevail, that these claims have been adjusted and ought to be paid, then the State could not, if it were in the case, say anything against that position, because it was to effect that very result that the Statute was enacted.

Barney against Baltimore City, 6 Wallace, 280, is much relied on to maintain the position that the State is an indispensable party, but the facts in that case are widely different from those in the case at bar.

It was there held, as stated in the syllabus, that particular owners or tenants in common in real estate, of which parti-

tion is asked in equity, have an interest in the subject matter of the suit and in the relief sought, so intimately connected with that of their co-tenants, that if these cannot be subjected to the jurisdiction of the Court the bill will be dismissed.

A single glance at the facts in the case show how wholly inapplicable it is as an authority in the matter under discussion.

Tenants in common to real estate are entitled to possession and, of course, the Court could not grant a final decree for any disposition of the property, or deal with it so as to affect the rights of tenants in common, who are not parties.

The Court there cites the case of *Shield v. Barrow*, 17 *Howard*, 180, in which it is said:

> "A very able and satisfactory discussion of the whole subject is that they, that is to say, indispensable parties, are said to be persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

Taking this definition thus adopted in the Barney case, and applying it to the facts in this case, let us see whether the State is an indispensable party to these proceedings.

Can a final decree be made without affecting the interest of the State? We say that it can, because the interest of the State is declared to be simply a surplus after just liabilities are ascertained, and the purpose of this proceeding is to ascertain the "just liabilities" and no more. The Court will not assume that there is any other purpose than to ascertain what is justly due to creditors. It will not do to say that the State is entitled to be present in the ascertainment of these amounts, because we are not dealing with the question now as to whether the State is a proper party, or whether the State could not be a party if she sought to come in, but whether in her absence the interest of other parties can be ascertained. In other words, there is no claim on behalf of the State

against this fund, which is to be adjudicated in these proceedings. The State has parted with the title, and the title can be disposed of without the State. There is no account for the State filed with the commission or in this Court, as in the case of the creditors. The State is not a creditor, but only entitled to the "surplus" after the creditors are paid. The State could seek no affirmative relief if a party to the proceedings. It would simply stand by while the investigation was being made. If it is said that the State has undertaken this investigation, and that the powers of the former investigating committee have been by this Statute of Feb. 17, 1907, in express terms, conferred upon the "Winding-up Commission," we answer that that has nothing to do with the question, because, by assuming jurisdiction, the Court does not preclude the State from continuing to participate in such investigation of the claims, nor could it, if it so wished; but the point we make is that the Court has a right to proceed without the State in ascertaining what are the just liabiliies, because the State has no claim to be asserted against the commission, for any specific amount, and the State has no longer title to the fund.

Now, as to the second part of the definition: Can a final decree be made in this case, without the presence of the State, without leaving the controversy in such a condition that its final determination may be inconsistent with equity and good conscience? Certainly, there are no conflicting equities or rights between the creditors, nor liens to be adjusted, nor any right to be ascertained, except how much liquor various claimants sold the Dispensary, and how much money is due therefor, and this in the light of the fact that there is far more than enough to pay all, and that the State is entitled to the surplus. If these matters cannot be fully adjudicated in the proceedings as they now stand, it is inconceivable to suppose that they could be adjudicated before the commission.

The conclusion of the Circuit Judge and Circuit Court of Appeals, that the State was not an indispensable party, and could not claim the immunity provided in the Eleventh Amendment, because it had gone into the business of dealing in

liquors, preventing its citizens from engaging in the same business, is sustained by the reasoning of the decision in the *State of South Carolina against United States*, 199 U. S., 437, for the collection of internal revenue tax, where it was held that the state may control the sale of liquor in South Carolina, but when it does so it engages in ordinary private business, which does not by the mere fact that it is being conducted by a State exempt it from the operation of the taxing power of the National Government.

The Internal Revenue tax on the sale of liquor is not a tax on property or profits of a business, but a charge on the business irrespective of the property used therein, or the profits realized therefrom. The exemption of the State agencies from National taxation is limited to those which are of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business, and in the case cited—*Barings against Dabney*, 19 *Wallace*, 1, the State was actually the owner of the entire assets of a bank, and had, by legislation endeavored to use the assets for the payment of the debts of the State as against the debts of the Bank, and the Court denying this right proceeded to administer the assets, the State not being a party to the cause.

This brings us within the line of the cases cited in support of the position that the officers of the State are really those who are the proper defendants in this case, who have the custody of the fund and the disposition of it, under a Statute, and that the Court can fully administer the fund without the presence of the State.

In the actions now before the Court the plaintiffs allege that there are specific amounts due them in the Fleischman case; that such amounts have been passed upon by the commission (see folio 29).

Now, under the express terms of the Statute, these are due from a trustee to a *cestui que trust*, and the presence of the State as a *cestui que trust* is not necessary to determine that issue. While these are not *aliquot* parts of a fund, they are fixed and determined, and the State is not entitled until they are paid.

"When each *cestui que trust* is entitled to an *aliquot* share of an ascertained fund, he may sue alone for any accounting as to his interest, and the *cestui que trustent* entitled to the other *aliquot* shares are not necessary parties. (22 Encl. Pl. & Pr., 100, and cases cited.)

"That the State cannot be made a party in a case where it is concerned is a sufficient reason for the omission to do so, and the case may proceed to decree against her officers in all respects as if she were a party to the record."

Davis v. Gray, 16 *Wall*, 203, *Citing Osborne v. Bank, supra.*

The decision of the Supreme Court of South Carolina in *Water Power Company v. Electric Company*, 43 S. C., 154, where it was held that the State was an indispensable party, was based upon the fact that the State had reserved certain rights to water power when it conveyed the power to a company, and the Act of the State was drawn in question. In the case at bar it is the failure of the State's agents to obey the State which forms the basis of the action. Referring to *In re Ayers*, 123 U. S., 500, the Court said that the distinction lay between that case and a case where the officers were wrong-doers, personally and individually, against whom the complainants had a clear right of action, and that no other parties were necessary.

And in another South Carolina case of *Lord v. Bates*, 48 S. C., 95, it was said that the State was not a necessary party to an application by a private citizen for mandamus to enforce a private right, and this was an application to compel the State reasurer, by mandamus, to fund certain bonds of the State under a Statute providing for such funding on certain conditions, the construction of the Statute being the matter before the Court, and the result of the case being to increase or not to increase the debt of the State, a matter in which it was vitally interested.

An examination of the legislation which vested this fund in the State Dispensary Commission shows that they represented the State to the extent of any surplus that may

remain after the just liabilities of the State have been paid. In other words, that it being their duty to see that the surplus was paid to the State after the debts contracted, for the purchase of liquor had been extinguished, the State was, and is, through them, constructively before the Court, as the record now stands.

The State could not be made a party as such, but the State can designate officers and agents to represent her so that she is represented in the proceeding by the officers of her own creation and appointment.

In *Arthur against Hughes*, 4 *Beavan*, 506, it was held that where an ascertained fund was remitted from abroad by an executor to a person in England to distribute between legatees, that the Court could determine the right of the legatees, without having a legal personal representative before the Court.

To avoid the rule thus clearly established in the older cases and affirmed at least in analogous cases of later date, the effort is made here to persuade the Court that there is no specific appropriation of the fund for these creditors of the State, but that the amount is uncertain and cannot be made certain except in a proceeding to which the State is a party.

We maintain that under the Act of 1907 there is a clear, specific appropriation of all funds derived from the sales of liquor to the payment of the debts contracted in its purchase, and that while the commissioners were to ascertain and determine which of the claims against the State were just, the State herself reserved no interest whatever in the fund until these liabilities had been paid.

In other words the creditors of the State were to be paid out of the fund so long as the fund lasted, until such debts were paid, and if a surplus, the surplus then to go to the State.

The presence of the State, therefore, was only necessary to fix the amount to be paid the creditors, and so long as the Commissioners are before the Court the State is represented by and through them, and her interests can be thus fully protected.

In discussing this question the petitioner's counsel, at page 11 of their brief, quote from the opinion of the Circuit Court of Appeals, in which that Court argues that where the duties

of the trustees are clearly defined, the trustor is not even a necessary party to a suit brought to compel the trustees to discharge their duty, and reference is also made to what was said in the opinion of the Circuit Court of Appeals with reference to an assignment for the benefit of creditors and the similarity of the Act creating the Dispensary Commission to such deed of assignment.

So far as the latter suggestion is concerned, it is enough to say that the Court referred to an assignment for creditors simply by way of illustration and comparison. It is true that the authorities cited by the petitioners seem to hold that in an action to enforce a trust under an assignment for creditors the assignor must be a party, if the deed provides that the surplus shall go to him, but the illustration adopted by the Circuit Court of Appeals is nevertheless appropriate to the case in hand, because of the peculiar conditions existing at the time of the passage of the Statutes under consideration.

The most casual reading of the Statutes will show that the primary object was to pay the debt incurred in the purchase of the liquor, and that the entire fund was assigned to the commissioners for that purpose. Their primary duty was to ascertain the debts and pay them, and it is submitted that under the authorities cited a right of action must necessarily be implied in the creditors to recover the amounts due them in an action against the trustees of the fund, especially after these debts have been ascertained by them.

In support of their contention the petitioners claim that the debts sought to be collected in this proceeding are debts of the State, and that they, the commissioners, represent the State. If this be the correct view, then it is submitted the State is constructively before the Court, and that is all that is required by the rule laid down by the authorities cited in petitioner's brief.

Besides *Gregory vs. Stetson*, already referred to, the petitioners refer to the case of *Minnesota against Northern Securities Co.*, 184., U. S., 235, in which the rule is "that those are to be made parties who are either legally or beneficially interested, so that a complete decree may be made."

If, therefore, the object of the winding-up Statute in the

case before the Court was to ascertain primarily what debts were due, and the commissioners themselves were to determine this, as representing (necessarily by virtue of their office and powers) the State—as they claim—then the State as a beneficiary of the fund, if it is a beneficiary, is "constructively" before the Court as the matter now stands.

The test, as applied in *Cunningham against Macon R. R. Co.*, 106 U. S., 440, cited in petitioners' brief, is whether the presence of the party is indispensable in order to enable the Court, according to the rules which govern its proceeding, to grant the relief sought.

In *Christian v. Atlantic, etc., R. R. Co.*, 133 U. S., 233, it is said that the State is an indispensable party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its debts, and it appears in the case now before the Court, upon the very face of the record, that the plaintiffs are not attempting to take the property of the State; the State has itself appropriated these funds specifically to the payment of such liabilities as shall be found to be just, and has relinquished its title to the property in dispute absolutely and irrevocably, and is only exacting that the surplus shall be paid to it after it has been determined what are the just liablities.

In *Williams v. Bankhead*, 19 *Wallace*, 571, and in *Barney v. Baltimore*, 6 *Wallace*, 280, the test is: will an absent party be directly affected by a decree made in his absence? And a complete answer to the objection now made to the absence of the State, and the assertion that the State is an indispensable party, is that the State cannot be affected by the payment of the just debts and liabilities of the State Dispensary, because, under the terms of the Statute, those liabilities are to be provided for and paid at all events.

In other words, even in the light thrown upon the question by these authorities, the interest of the State cannot suffer or be affected by a determination in the forum sought by the petitioners on the question of the justness of their debts, that being, as has been shown, the primary object of the Statute.

This view was taken by the Circuit Court of Appeals, and none of the authorities cited by the petitioners show that there was error in so holding.

Again, the same doctrine, that it is sufficient if the party, whose absence constitutes the ground of complaint, is constructively before the Court, is clearly laid down in the cases cited by the petitioners, *Chadbourne v. Coe*, 45 *Fed.*, 822, and *Ribon v. Railroad Co.*, 16 *Wallace*, 450. It is said there that the Court should not proceed unless the party is actually or constructively before it, and so on in effect, if not in express terms, it is decided in all of the authorities cited in the petitioners' brief.

In other words, the extent to which the Courts have gone is that, though they will not proceed to pass upon the rights of absent defendants, who have a substantial interest in the thing in controversy, they will do so if such defendants are constructively before the Courts, so that their interests must necessarily be provided for in any decree which may be made as betwen the parties then and there before the Court.

The opinion of the Circuit Court of Appeals has presented this matter in another aspect, which is very suggestive, and which is practically conclusive of the question now under discussion. Briefly stated, it is this: There is no doubt but that the State can now come in and be made a party for the protection of whatever interests she may have in this fund, if so minded. Can the State remain out of the case, having by previous legislation gone into the liquor business, and having conducted it for years, and now fall back, as an excuse for her voluntary absence, upon the protection offered by the provisions of the Eleventh Amendment to the Constitution? The conclusive answer is found in the case cited in the opinion below, *Bank of United States against Planters' Bank of Georgia, Wheaton*, (22 United States) 904, in which it is said:

> "It is, we think, a sound principle that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."

And we refer also to another case cited by the Circuit Court of Appeals in the same connection. *South Carolina vs. United States*, 199 *U. S.*, 437, *in which it was said*:

> "These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

THIRD.

The Question as to the Jurisdiction of the Circuit Court.

See *Gunter, Attorney General of South Carolina, v. Atlantic Coast Line R. R. Co.*, 200 *U. S.*, 273.

In this case the railroad company claimed exemption from taxes as to a part of its line theretofore controlled by another corporation which had been so exempt by the Legislature for a number of years. It was claimed that such exemption was of force although the property so exempted had passed into the hands of the then owners. It appeared that the suits had previously been brought against certain County Treasurers to enjoin the collection of taxes, and in such suits the Attorney General, pursuant to statutory provisions, had appeared on behalf of the State. It was held that this was a waiver of the immunity of the State from suit, and that such immunity could not be invoked in an ancillary suit subsequently brought against the successors of the original defendants to enforce the decree.

It is possible, therefore, for the State to waive its immunity from suit. The Circuit Court of Appeals held under the authorities cited that such immunity was waived when the State went into the business of buying and selling, and that such immunity, under the Eleventh Amendment, could not be claimed as against bills contracted in the purchase of the merchandise which the State undertook to buy and sell. We

submit that this is just as strong a waiver as the appearance in Court of the Attorney General in the *Gunter case* "for and on behalf of the State of South Carolina."

It will be remembered that the Dispensary had been established and maintained, purchases made, and debts contracted by the authority of Act of the Legislature, and it is submitted that this was a waiver of its immunity from such for the reasons so cogently stated and emphasized by the Circuit Court of Appeals.

The argument upon the other questions raised by the petition will, we think, satisfy the Court that the Circuit Court did have jurisdiction of the subject matter and of the parties to these suits. The precise question, however, was determined in *Chaffraix v. Board of Liquidation and others,* 11 *Fed. Rep.*, 638, where it was held "the Circuit Court has jurisdiction to prevent, by injunction, the officers of a State from divesting a fund collected by taxation and set apart under a Statute of that State to pay certain bonded indebtedness of said State, to the end that said fund may be preserved intact until the rights of the parties and the interests of the State, of any she has, may be determined contradictorily. Such action is not forbidden by the Eleventh Amendment of the Constitution of the United States, and is necessary for the proper enforcement of Section 10 of Article 1 of the same instrument."

A further discussion of this question arises incidentally in what is to follow upon the next point. We assume that under this head petitioners will maintain that the defendants constitute a Court, and that under Section 720 of the Revised Statutes injunction will not lie to restrain them as prayed for in the bill.

There have been many commissions and boards and other similar bodies established by the State legislation throughout the years, and the question has often arisen in this and other Courts as to whether these constitute Courts, as the term is usually understood?

If we go back to Blackstone's Commentaries we find that in Volume 3, page 25, a Court is defined in modern signification "to consist of at least three constituent parts, the *actus*,

the *reus* and the *judax*—the actus, or plaintiff, complains of an injury done; the reus, or defendant, is called upon to make satisfaction for it, and the judax, or judiciary power, is to examine the truth of the fact, and if any injury appears to have been done to ascertain and by its officers apply the remedy."

It would be difficult to find a definition which more clearly describes a Court in all its parts and all its functions.

In *United States against Ferreira*, 13 Howard, 373, the question arose whether the District Judge of the United States for Florida, who by Act of Congress was directed to adjudicate the claims for injuries suffered by the inhabitants of Florida by operation of the American Army in Florida—which claims were to be paid if the Secretary of the Treasury should, on report of the evidence, deem it equitable, constituted a Court, and it was held that the authority given him was not to exercise any of the judicial powers of the United States under the Constitution, but that the Judge acted as a "Commissioner," and no appeal lay from his decision to the Supreme Court.

The question is very elaborately discussed, and the want of power as a Court was held to exist because of the provisions of the Constitution of the United States. This authority naturally leads us to consider the Constitution of South Carolina in its bearing upon the question now before the Court.

The only Courts provided for under the Constitution of the State of South Carolina are, first, a Court for the trial of impeachment; second, a Supreme Court; third, a Court of Common Pleas and General Sessions; fourth, a Probate Court; fifth, Courts of Magistrates, and sixth, such other inferior Courts as the General Assembly may from time to time in their wisdom establish.

A commission cannot be held to be within the terms of this constitutional provision, in that it is not in any respect "an inferior Court." It has no power to enter judgment or issue execution. There are no pleadings provided for it, no procedure adopted; provision is not made for appearance of parties before it in the way in which they are ordinarily to appear

in Court, and a careful examination of the entire Statute fails to disclose that the Legislature contemplated the creation of any kind of Court.

In Section 7 of the Statute (see folio 127) it is directed that the Commission shall submit to the Governor at the earliest date practicable a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and, as soon as the affairs are liquidated, a report in full of their actings and doings.

It would be inconceivable to suppose that the Legislature intended to create a Court which was to report to the Executive head of the State. The Executive and Judicial functions and departments are forever to be separate, and such provision would violate the spirit of our institutions.

The commissioners, as we have seen, are to give each a bond for ten thousand dollars. What a strange departure in our legislation, to require a Judicial Officer to give bond. Each of the commissioners is to have the power of all of them. This shows clearly the intention that they shall act simply in a ministerial and not in a judicial way.

Referring again to the Constitutional provision to which we have heretofore referred, we find that in this last cited case the Constitution of Kansas, Article 3, par. 1, authorized the Legislature to create Courts inferior to the Supreme Court, and by implication to define their jurisdiction, and it was held that this did not confer the power to create Courts for the exercise of legislative or administrative functions.

In *Chicago, Milwaukee, etc., R. R. against Minnesota,* 104 U. S., 418, the question arose whether a warehouse and railroad commission constituted a Court.

The usual powers given to such organization were conferred by an Act creating it, and it was held that the Act was in conflict with the Constitution of the United States as depriving a company objecting to the rates fixed by the Commission of its property without due process of law, and deprived of the equal protection of the law. It appears that the Supreme Court of Minnesota had held that there was no power in the Courts to stay the hands of the Commission if it chose to establish rates which are equal and unreasonable,

and in considering this question the Supreme Court of the United States, speaking by Mr. Justice Blatchford, says: (Page 456-467.)

> "This being the construction of the Statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State Court, cannot be regarded as clothed with judicial functions or possessing the machinery of a Court of Justice."

Mr. Justice Miller concurs in the result in this case by a series of propositions which clearly indicate his view that if such commissions should be held to be Courts having the right under the Statutes creating them finally to dispose of a matter in litigation, the result would be practically to destroy the value of property employed in the carrying on of business, and to give rise to other evils not to be permitted under our system.

We think this disposes of the view raised in the pleadings that this "Winding-up Commission" constitutes a Court whose proceedings cannot be enjoined within the provisions of Section 720 of the Revised Statutes.

Nor can it be said that the fact that the Commission was given the powers given by former legislation to the Investigating Committee, made it a Court, whose powers, however broad, were only the powers of a Legislative Committee, engaged in the investigation of a matter upon which the Legislature wished to be informed.

The provisions giving that Commission power to stop the payment of claims against the Dispensary were clearly

intended simply to hold matters *in statu quo* pending that investigation, and so with all the other provisions of the Act creating and giving power to the Investigating Committee, they have no reference to the ascertainment of this last fact: what are the just liabilities of the State Dispensary, so that they may be paid out of the assigned estate of that institution.

They are to "sell property and to pay debts"—to pay all "liabilities" or "all just liabilities"—it matters not which, "of the State Dispensary."

In other words, they are to take the assets as they find them and, as agents or trustees, sell and realize upon them, and as such agents or trustees pay out the proceeds of their collections, returning to the State the surplus, if any.

In the *Southern Pacific against the Board of Railroad Commissioners*, 78 Fed., 236, the question arose as to whether certain Boards of Commissioners for railroad and other corporations created under the Constitution and laws of California constituted a Court. They were named there also "A Commission." Now, these Commissioners were given very large powers. *Inter alia*, they were to establish rates of charge for transportation of passengers and freight by railroad and other transportation companies, and they could enforce their decisions and correct abuses through the Court, and it was held (Judge McKenna) that this Commission was not a Court.

In *Ex Parte Childs*, 12 S. C., 111, it was held that a Commissioner appointed to take proof of bonds alleged to be invalid, and to ascertain and report what bonds and what proportion of bonds were valid obligations of the State, was not a Court, but only an officer charged with certain ministerial duties. Here it was called a Court—"The Court of Claims"—and had many of the attributes and functions of a Court.

In *Busch v. Webb*, 122 Fed., 655, it was held that a Commissioner's Court of a county in Texas, in declaring and publishing the result of the election, "acts ministerially and is not a Court in the meaning of the Revised Statutes" (Sec. 720) "whose action in such capacity may not be restrained by the Federal Court."

This question is very fully considered and the authorities cited, and it was held that something more was necessary than the mere conferring of ministerial powers, even when the exercise of such powers was to lead to a definite result in reference to the election.

Western Union Telegraph Company vs. Myatt, 98 *Fed. Rep.*, 331. The question arose in this case as to whether the Court of Visitation of Kansas created by an Act of Legislature and given thereby and by the general laws of the State general powers to regulate the business of railroad and telegraph lines within the State, and among others the power to classify freight, to require the maintenance and construction of depots, regulate crossings and intersections of railroads and the operation of trains, with various other powers and duties, therein mentioned, is in the exercise of such power a legislative, administrative body, or whether it was a Court. It was held that it was the former, though it was denominated "a Court," and provided with the machinery of one, and it was held that even the power to conduct an investigation in the form of legal proceedings, before taking action in the matters committed to it, did not constitute it a Court.

Referring again to the constitutional provisions to which we have heretofore referred, we find that in this last cited case the Constitution of Kansas, Article 3, par. 1, authorized the Legislature to create Courts inferior to the Supreme Court, and by implicaton to define their jurisdiction, and it was held that this did not confer the power to create Courts for the exercise of legislative or administrative functions.

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the Supreme Court of Minnesota had held that there was no power in the Courts to stay the hands of the Commission if it chose to establish rates which are equal and unreasonable, and in considering this question the Supreme Court of the United States, speaking by Mr. Justice Blatchford, says: (Page 456-457.)

> "This being the construction of the Statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State Court, cannot be regarded as clothed with judicial functions or possessing the machinery of a Court of justice."

Mr. Justice Miller concurs in the result in this case by a series of propositions which clearly indicate his view that if such commissions should be held to be Courts having the right under the Statutes creating them, finally to dispose of a matter in litigation, the result would be practically to destroy the value of property employed in the carrying on of business, and to give rise to other evils not to be permitted under our system.

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Nor can it be said that the fact that the Commission was given the powers given by former legislation to the Investigating Committee, made it a Court, whose powers, however broad, were only the powers of a Legislative Committee, en-

gaged in the investigation of a matter upon which the Legislature wished to be informed.

The provisions giving that Commission power to stop the payment of claims against the Dispensary were clearly intended simply to hold matters *in statu quo* pending that investigation, and so with all the other provisions of the Act creating and giving power to the Investigating Committee, they have no reference to the ascertainment of this last fact. What are the just liabilities of the State Dispensary, so that they may be paid out of the assigned estate of that Institution.

We desire to call the Court's attention to the recent case of *Robert R. Prentiss et al v. Atlantic Coast Line R. R. Co.*, and was decided by this Court in December last. This case involved the question whether the United States Circuit Court could restrain the State Corporation Commission of Virginia from enforcing certain passenger rates fixed by that Commission under Statutes authorizing them so to do, passed by the Legislature of Virginia, upon the ground that such legislation was unconstitutional. The Circuit Court had issued the injunction, and its action was reversed by the Supreme Court, but this reversal was upon the ground only that a right of appeal was provided to the Court of Appeals of Virginia from the judgment of the Corporation Commission, and that it was proper that such appeal should be taken and the matter finally disposed of in the highest Court in the State of Virginia, before this Court could interfere on writ of error from that Court. A majority of this Court sustain, however, the position taken that injunction to restrain the enforcement of such rates would lie notwithstanding that some of the powers given to the Corporation Commissions were of a judicial nature, that is to say that the Commission was to act judicially in determining the rates paid; in enforcing them it was simply performing the duty put upon it by the Legislature. It was also held that a bill filed in the Federal Court against the State Commission to restrain its members from enforcing railway passenger rates, established by such Commission, on the ground that such rates are confiscatory, is not bad as an attempt to enjoin legislation, or as a suit against the State.

FOURTH.

The Fund in the Commissioners' hands Constitutes a Trust Fund.

The fourth question raised in the petition is whether the Circuit Court of Appeals erred in holding that the Act of February 16, 1907, created an irrevocable trust which could be enforced and executed by said Circuit Court.

In *McKee against Lamon*, 159 United States, 317, it was held that "where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter which may be enforced by a bill in equity if not by an action of law, and that the acceptance of money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purpose intended by the bailor, and that in the enforcement of such a trust a Court of Equity may make such incidental orders as may be necessary for the proper distribution of the fund."

In *Clews against Jamison*, 182 U. S., 401, funds were placed in the possession of the Governing Committee of the Stock Exchange in trust, that it would see that the purposes of the deposit were fulfilled, and that the money was paid out only in accordance with the terms of the Trust under which it was deposited," and it was held that there was no question that the fund became thereby a *trust fund* in the possession of the Governing Committee, and that it must be disposed of in accordance with the trust. "The Committee occupied, from the time of the deposit, a fiduciary relation towards the parties depositing it and became a Trustee of the fund, charged with the duty of seeing that it was thus applied."

The foregoing principles thus laid down in these authorities are general, but if it be said that they have no application to the fund owned by a State, the answer is found in the decision of the Supreme Court of the United States in *Baring vs. Dabney*, 19 *Wallace*, 1. In that case it appeared that in 1812 the Legislature of South Carolina by Statute created a bank by the name of "The Bank of the State of

South Carolina," the capital was to consist of various stocks, bonds and securities specified, then belonging to the State, the same being, in fact, all the funds, bonds and securities which the State owned. The bank thus belonged to the State. The President and Directors were to be elected by the Legislature, and made a corporation and body politic. The faith of the State was pledged to the support of the bank. In December, 1821, by another Statute, the future profits of the bank were pledged and set apart for the payment of a certain six per cent. stock which the State had previously issued. This Statute, as well the subsequent legislation, gave rise to the controversy in the case, and the question arose whether the Statute could appropriate assets of the bank so as to divert them from the debts of the bank to the debts of the State, and it was held that although the stock was altogether owned by the State, if the bank be insolvent, its assets cannot be appropriated by legislative act or otherwise, to pay the debts of the State as distinguished from the debts of the bank; *that the assets of the bank were a trust fund, first applicable to the payment of the debts of the bank.*

It was said that "An Act of the Legislature requiring the managers of an insolvent bank belonging to the State to hold its assets appropriated to the payment of certain specified debts, creates a trust in favor of the creditors holding said debts and, if assented to by them, amounts to a contract with them to carry out said trusts."

And to give effect to such legislation so substituting the debts of the bank for the debts of the State would be to approve a law which was repugnant to the clause of the Constitution which prohibits a law impairing the obligation of contracts.

Now, in this case the assets of the State Dispensary were originally owned by the State, but were pledged by the very Act creating the Dispensary, from the very necessity of the case, to the payment of the debts of the Dispensary. The creditors of the Dispensary could never have sued the State for the recovery of the amounts due them so long as the money remained in the treasury of this State; but when

the money was transferred by subsequent legislation to the Commissioners it went into their hands impressed, from the relation of the parties and the nature of the original contracts, with a trust in favor of the creditors, which must be recognized in advance of the implied trust which still remained for the State, even if there had been no express trust for the State, as to any surplus after the creditors were paid, and the clear intention of the Statute is to give the creditors, first, a controlling lien upon this trust fund so in the hands of the Commissioners, otherwise the Statute is a vain excuse, giving the creditors no security whatever, and would evidence, what we do not think could be possible, a disposition on the part of the State to ignore and defeat their claims, in order that the State might reap a larger profit. Such, we submit, cannot be the construction of the Statute; and even if it were the intention of the Legislature thus to defeat the claims of the creditors of the State by continuing to keep the money beyond their reach, such act would be unconstitutional. Good faith, as well as the legal obligation, required that that should be done which was intended to be done, to impress upon this fund a trust which should remain until the last dollar of just indebtedness had been paid, and that, too, before the State could receive one dollar of the money.

As further illustrative of the position that this is a trust fund in the hands of the Commissioners, see *Macnhaut et al against City of New Orleans et al, 2nd Woods*, 108.

In that case money was collected to pay the interest on bonds issued by the municipal corporation, under an Act which provided that a tax to pay the interest should be levied, and enacted safeguards to secure the levy and collection, on the faith of which legislation the bonds were sold. This Act was held a contract with the bondholders, the substantial performance of which they are entitled to exact, and it was further held that the money collected to pay the interest on said bonds levied, collected and set apart according to the provision of the Act, is a trust fund for that purpose, and the municipal corporation may be enjoined from using it for any other purpose without the consent of the bondholders.

See also in this connection, *Case v. Beauregard*, 101 U. S., 688.

In the case of *"Board of Liquidation against McComb*, 92 U. S., 531, will be found an elaborate consideration of the entire doctrine."

In that case it was held that although the State could not be sued by an individual, and that a Court could not substitute its own discretion for that of executive officers, in matters belonging to their proper jurisdiction, yet when a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have mandamus to compel its performance, and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.

It is said in "Daniel's Chancery Pleading and Practice," Volume 1, page 243;

> "Moreover, in some cases where the fund, the subject of the suit, has been ascertained and appropriated, the Court has dispensed with the appearance of a personal representative to the testator, by whose will the fund has been bequeathed."
>
> And, in *Gregory against Stetson*, 133 U. S., 585, it appears "that the property upon which that part of the case was decided was that a Court cannot adjudicate directly upon a person's rights without having him *actually or constructively* before it, and it is stated that this principle is fundamental.

The petitioners maintain (page 18 of Petition) that the Act of 1907, under which the Commission was appointed, did not create a trust, and that it did not divest the State of all control or disposal of the State Dispensary Fund, so that the Act next hereinafter referred to would be operative.

To support this position reliance is placed upon certain constitutional provisions, now for the first time invoked in

the cause, with reference to the ascertainment and payment of claims against the State (page 19).

Giving full effect to the South Carolina case of *Bank vs. State*, 60 S. C., 465, there cited, which holds that under the Statute under consideration in that case, claimants had only a right to have their claims established, and to sue upon them, and that such claims were not thereby finally validated, beyond further question, we submit that the Statute in this case is very different. Here the Commission under the Act of 1907 were not only to investigate the claims, and to pass on them, but also to pay them, without further action of the Legislature, out of a fund which was assigned to them by the Statute for that purpose, and this surely created a trust in favor of the creditors, as has been seen.

Here is the distinction between the case at bar and the class of claims contemplated by the constitutional provisions relied on, and also when the case also relied on, of *Campbell vs. Sanders*, 43 S. C., 577, was decided.

A mere power to investigate his claim would not, of course, create a trust in favor of the creditor, or a legislative contract with him. But the case must be wholly different when the Legislature, recognizing that there is a contract, appropriates money, by handing it over to Commissioners charged not only with the duty to investigate the claims, but also clothed with the power to pay out the trust funds to the beneficiaries provided for as a class in the Statute.

Reference is also made in petitioner's brief to *South Carolina vs. Gaillard*, 101 U. S., 433, and it is claimed that that case is in point. It will be at once observed, however, that the contention there was that the Act permitting the taxpayer to tender bills of the Bank of the State in payment of taxes, and have them sealed up and deposited to await the determination of the question whether they were to be received for taxes, constituted a new contract, while in the present case the Act of 1907, creating the Winding-up Commission, defendants herein, provided that the Commission should itself pay the just liabilities of the State incurred in the liquor business out of the assets assigned to it by the Statute.

The creditors, therefore, had an interest in this assigned fund, if their claims constituted just liabilities of the State Dispensary, and no subsequent legislation could defeat that right, and the Circuit Court had taken jurisdiction, and had jurisdiction of a cause which was to determine whether such claims were then and there to be paid.

We are dealing now with the question whether the money in the hands of the defendants constituted a trust fund. As to the effect of the Act of 1908, which was passed after this proceeding was commenced, and which attempted to lessen the power of the Commission, and change the status, we shall have a brief discussion of the end of this division of the argument.

The petitioner cites a number of cases (page *22*) to the effect that if this Act of 1907 created a Commission, before which the State authorizes its creditors to sue, and to have their claims established and adjusted, then it cannot amount to a contract irrevocable.

An examination of these cases throws very little light upon the question now before this Court, because the Statutes there considered provided simply for the investigation of claims, and not for the payment of them out of a fund specifically provided for that purpose.

We shall take up these cases and briefly see what was involved in them, and the point decided.

Beers vs. Arkansas, 20 *Harvard*, 517.

Here it was held that permission to bring the suit was not a contract, which could not be withdrawn by subsequent legislation. That is not the question here. In this case money has actually been appropriated for the payment of the debt.

Railroad v. Tennessee, 101 *U. S.*, 377.

Here it was held that a Statute which gave a right of action against a State could be repealed, but it does not appear that the right to sue was a part of the original contract, or that the Act giving the right to sue was coupled with a legislative declaration that money should be held in trust to await the result.

Railroad v. Alabama, 101 *U. S.*, 832.

In this case the Statute gave the right of action against the State, and was afterwards repealed. *Held* that this deprived the Court of jurisdiction, but did not impair the obligation of the contract.

The difference between this case and the one under discussion is obvious, as stated above.

Hans v. Louisiana, 134 *U. S.*, 17.

This case decided two points—That a State cannot be sued by one of its own citizens in a Federal Court without its consent, and that when a State attempted to violate property rights, acquired under a contract with it, such attempt may be judicially resisted, and any law impairing the obligation of such a contract is void and powerless to affect such rights.

In re Ayers, 123 *U. S.*, 507.

Here also was a case involving the Statute of Virginia as to tendering coupons of State bonds for taxes, and the bringing of suits to recover the taxes from person so tendering them, and can have no reference to this case.

DeSaussure v. Gaillard, 127 *U. S.*, 216.

In this case it was held only that when the State gives the right of action against one of its officers, which is practically against the State, it may provide for certain limitations and restrictions upon the exercise of the right, which is simply providing for a remedy against the State or its officers, and does constitute a contract, and therefore the Statute could be repealed.

Smith vs. Reeves, 178 *U. S.*, 436.

The point decided here was that when the State permitted one who complained of the assessment of his property for taxes to pay the taxes, and bring an action against the treasurer to recover the amount claimed to have been illegally assessed, the State could couple with the consent to be sued a condition that the suit be brought in one of her own Courts.

The Amendment of 1908.

Now, in this connection, it appears from the record page that the Legislature of South Carolina passed a Statute in 1908 which attempted to enlarge the powers of the Commission, and give it more of the nature and functions of a Court than had been conferred upon it by previous legislation. We submit that this Act of 1908 cannot effect the rights of these complainants now before the Court.

The decision of the State Supreme Court in upholding this Act amending the "Winding-up Act," adopted by the General Assembly on February 24th, 1908, after these proceedings had been begun in the Circuit Court, and only a few days before the decision of the Circuit Judge was announced, fails to recognize and enforce the principle that such amendment is contrary to the Constitution of the United States.

This is essentially a question which this Court will consider whenever it is properly raised, and will disregard the decision of the State Court if it appear that the Statute violates the provisions of the Federal Constitution.

It appears at page 204 of the record that the State Court gave full force and effect to this amendatory Statute, and it also appears, at page 206 and 7, in the traverse filed by the plaintiffs to the return of the defendants, that the defendants set up in the first paragraph of their traverse that they are advised and verily believe said Act (that is the first Act creating the "Winding-up Commission), and the acceptance by the defendants, constituting the State Dispensary Commission, as trustees of the trust created by said Act, and the acceptance by the complainants and the other creditors of said State Dispensary as *cestui que trustent* of the benefits of the trust so created, constitute a valid, binding and irrepealable contract within the meaning and protection of the Constitution of the United States.

And in the second paragraph the plaintffs specifically assail the said amendatory Act of 1908 as a violation of the provisions of Art. 1, Sec. 10, of the Constitution of the United States, and Article 14, Section 1, of the amendments thereof, upon the ground that said Act impairs, and attempts to impair, the obligation of the contract set out in the 1st paragraph,

and deprives, and attempts to deprive, the complainants of their property without due process of law, and denies, and attempts to deny, them the equal protection of the law.

It is to be observed that the first Act creating the commission specifically directed them to pay the just liabilities of the State Dispensary; and the second Act, amendatory thereof, passed after the plaintiffs had filed accounts with the Commission, and had had them adjudicated, and when the only thing left to be done was to pay them, gives the Commission very large powers to pass upon, fix and determine all claims against the State growing out of dealings with the Dispensary; and it directs it to pay only such claims as have been submitted to and determined by it, and no others, out of the assets of the Dispensary.

It is true it does give the claimants the right to appeal to the Supreme Court as in cases at law and regulates the practice on such appeals.

This Court, we submit, had jurisdiction of these complainants and defendants before this Statute was passed, and had it for the purpose of enforcing the provision of the former Statute upon a state of facts crystallized before the proceeding was brought. The rights of these complainants, therefore, were fixed, first under the Statute of 1907, and secondly by the orders of this Court in this proceeding.

An attempt, therefore, was made to deny and deprive the Circuit Court of its jurisdiction by passing the other Act.

Now, the new Act would require these complainants, if it affects them at all, to go before the Commission again and try their case, and appeal to the Supreme Court of the State, and wait until in the usual course of business in that tribunal the case might be heard and the decision handed down.

The new Act, therefore, was a denial of the rights which the complainants had under the old contract, that is, to proceed to the office of the Commissioners and receive their money upon claims which had been passed upon by them, and it impaired materially the rights given to the plaintiff under the Act of 1907, which were the rights of the *cestui que trustent*, to demand of the trustees a prompt and faithful performance of their duty.

In *Antoni v. Greenhow*, 107 U. S., 769, the same process was adopted by the State of Virginia. Procedings were pending in the Courts to enforce the payment of coupons upon State bonds by tendering them for taxes. The Legislature adopted an amendment of the Statute, under which this was permitted, which amendment provided another mode of procedure than that in force when the coupons were issued. The Supreme Court held that the new section furnished an adequate and efficacious remedy, substantially equivalent to that which existed at the date when the coupons were issued, and, *therefore*, the rights of the holder of them, in case the collector refused to receive them for taxes, can be maintained and enforced, and that the obligation of his contract with the State was not thereby impaired.

The difference between that case and the one now before the Court is obvious. The plaintiffs here are absolutely deprived of their money until they have complied with the regulations and gone through a process not included within the terms of the Statute which created the trust of which they are the beneficiaries.

Pennoyer v. McConnaughy, 140 U. S., 1.

An Act of the Legislature of Oregon, of January 17, 1879, repealed an Act of that State of October 26th, 1870, both Acts concerning the swamp and overflowed lands, and the second Act made new regulations concerning the same. An application to purchase some of these lands had been filed after the first Act before the enactment of the second. It was held, first, that such an application could not be perfected by making the payments required by the Act of 1870, after its repeal, but within the time prescribed by that Act, and the title thus acquired was good against the State; it was further held that the Act of the Legislature of 1887, declaring all certificates of sale of swamp or overflowed lands void, on which twenty per cent. of the purchase price was not paid prior to January 7th, 1879, and required the Board of Commissioners to cancel such certificates, impaired the contract made by the State with the defendant in error, under the Act of October 26th, 1870, as that Act and the Act of 1879 are construed by

the Court, and therefore in violation of Art. 1, Sec. 10, of the Constitution of the United States.

See also *Piqua Branch of State Bank against Knoop*, 16 How., 369.

Osborne v. United States Bank, 9 Wheaton, 738.

Davis vs. Gray, 16 *Wallace*, 203.

FIFTH.

There is Equity in these Proceedings.

The next question for discussion is whether there is equity in the bills and whether they disclose a cause or necessity for granting an injunction and appointing receivers. It will be observed that the position taken in the bills filed in the several causes is that these claims had been adjusted by the commissioners who had refused to pay them, and that unless this Court of equity interfered by injunction the funds would be put into the hands of the State Treasurer and thus placed beyond the reach of the complainants and other creditors in like situation. (See pages 269-270-271 of Transcript.)

The law upon this point is very clear.

In Wyman vs. Wallace, 201 U. S., 230, *it is said*:

"It is suggested that no judgment had been obtained upon the note prior to this suit in equity, but as one object of the suit was to subject to the satisfaction of the debt certain property conveyed to a trustee as security therefor, no judgment at law was a prerequisite, Day v. Washburn, 24 How., 352; Case v. Beauregard, 101 U. S., 688, 691, in which the Court said: 'Without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan v. Evans*, 11 *N. H.*, 311; *Holt v. Bancroft*, 30 *Alabama*, 193.'"

The same doctrine is sustained in the case of *Denver Railroad against United States*, 124 *Fed. Rep., page* and also in 20 *American and English Ency. of Law*, 345.

Here the trust is given by the Statute, the positive direction

of which is that the just liabilities be paid. The debts have been ascertained and should be paid, and the fund kept intact for that purpose.

The purpose of the action and the prayer of the bill is to preserve the fund for the benefit of the *cestui que trustent.*

SIXTH.

The two remaining assignments of error (six and seven) complain that the Circuit Court of Appeals did not reverse the order and decree for injunction and appointing receivers, and in not directing the dismissal of the bill. These are general and are disposed of in the discussion of the questions raised by the other exceptions.

T. MOULTRIE MORDECAI,
FRANK CARTER,
SIMEON HYDE,
H. C. CHEDESTER,
Solicitors for Wilson Distilling Company, Respondent.

Office Supreme Court, U. S.
FILED.
MAR 2 1909
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 625.

W. J. MURRAY, JOHN McSWEEN, AVERY PATTON, ET AL., PETITIONERS,

versus

WILSON DISTILLING COMPANY ET AL. AND THE FLEISHMANN COMPANY, RESPONDENTS.

MEMORANDUM CALLING ATTENTION TO THE PROVISIONS OF THE SOUTH CAROLINA STATUTES SUBMITTED FOR RESPONDENTS.

T. MOULTRIE MORDECAI,
Of Counsel for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES.

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versus

WILSON DISTILLING COMPANY ET AL. AND THE FLEISHMANN COMPANY, RESPONDENTS.

Memorandum Calling Attention to the Provisions of the South Carolina Statutes Submitted for Respondents by T. Moultrie Mordecai.

The original Dispensary Act, Laws of 1892, Twenty-first Statute, was passed on December 24, 1892, and in section 2 provides as follows:

> "The State commissioner shall not receive from said county dispensers for such liquors sold to them more than fifty per cent. above the net cost thereof, and all amounts so received by him from said sales shall be by him paid over to the treasurer of the State monthly, under such rules as may be made by the State board of control to insure the faithful return of the same; and the State treasurer shall keep a separate account with said fund, from which the commissioner shall draw, from time to time, upon warrants

duly approved by the said board, the amounts necessary to pay the expenses incurred in conducting the business of said agency."

The next act, Laws of 1893, Twenty-first Statute, was approved on December 23, 1893, and in section 3 provides as follows:

"The State commissioner shall deposit all amounts received by him from sales to county dispensers or others with the treasurer of the State under such rules as may be made by the State board of control to insure the faithful return of the same, and the State treasurer shall keep a separate account with said fund from which the commissioner shall draw from time to time, upon warrants duly approved by the chairman of said board, the amounts necessary to pay the expenses incurred in conducting the business. All rules and regulations governing the said commissioner in the purchase of intoxicating liquors, or in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the State board of control."

The next act, Laws of 1894, Twenty-first Statute, was approved on January 2, 1895, and in section 3 provides as follows:

"The State commissioner shall deposit all amounts received by him from sales to county dispensers or others with the treasurer of the State under such rules as may be made by the State board of control to insure the faithful return of the same, and the State treasurer shall keep a separate account with said fund, from which the commissioner shall draw from time to time, upon warrants duly approved by the chairman of said board, the amount necessary to pay the expenses incurred in conducting the business. All rules and regulations governing the said commissioner in the purchase of intoxicating liquors or in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the State board of control."

The next act, Laws of 1896, Twenty-second Statute, was approved on March 6, 1896, and in section 3, page 125, provides as follows:

> "Each county dispenser shall remit to the State treasurer all moneys accruing to the State from the sale of liquors under such rules as may be prescribed by the State board of control, and the State treasurer shall keep a separate account with said fund, from which the State board of control shall draw from time to time upon warrants, or in such manner as they may provide, the amount necessary to pay the expenses incurred in conducting the business. All rules and regulations governing the said commissioner or county dispensers in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the State board of control."

And again, another act in the same volume, page 149, Act No. 62, approved March 9, 1896, provides as follows:

> "An Act to Require the State Treasurer to Transmit Monthly to the State Board of Control Monthly Statements.
>
> "SECTION 1. Be it enacted by the General Assembly of the State of South Carolina, That from and after the passage of this act, in order to facilitate the keeping of the accounts of the State dispensary, it shall be the duty of the State treasurer on the first days of each and every month to transmit to the State board of control a statement of all moneys received by him upon account of the State dispensary during the preceding month, and a statement of all dispensary warrants paid by him during said month, said statement to contain the number and amount of all warrants so paid, their dates and the names of the payees, together with a statement of the balance in the State treasury to the credit of the State dispensary on the first day of said month.
>
> "Approved the ninth day of March, A. D. 1896."

The next act, Laws of 1897, Twenty-second Statute, was approved on March 5, 1897, and in section 3, page 540, provides as follows:

> "Each county dispenser shall remit to the State treasurer all moneys accruing to the State from the sale of liquors under such rules as may be prescribed by the State board of control, and the State treasurer shall keep a separate account with said fund, from which the State board of control shall draw from time to time upon warrants, or in such manner as they may provide, the amount necessary to pay the expenses incurred in conducting the business. All rules and regulations governing the said commissioner or county dispenser in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the State board of control."

Section 9, page 131, Laws of 1898, provides in part as follows:

> "All moneys received by the county dispenser belonging to the State shall be forwarded on Monday of each week to the State treasurer, and at the same time the county dispenser shall forward to the State board of control a duplicate statement of the remittance so made to the State treasurer."

The next act, Laws of 1900, Twenty-third Statute, was approved on February 13, 1900, and in section 3, page 437, provides as follows:

> "The said board shall devise such a system of bookkeeping and accounting as it may deem advisable. The said board shall prescribe all rules and regulations, not inconsistent with law, for the government of the State dispensary and the county dispensaries."

The Code of Laws of South Carolina, 1902, section 699, page 279, provides as follows:

> "All payments by the treasurer of the State, except for interest on the public debt and the pay of members, officers, and employés of the General Assembly,

shall be made on warrants drawn by the comptroller general, and the vouchers for the claims shall be filed in his office. The said warrants in the hands of the treasurer, properly endorsed, shall be sufficient vouchers for the payment of the same."

Section 706 provides as follows:

"In order to facilitate the keeping of the accounts of the State dispensary, it shall be the duty of the State treasurer, on the first days of each and every month, to transmit to the State board of control a statement of all moneys received by him upon account of the State dispensary during the preceding month and a statement of all dispensary warrants paid by him during said month, said statement to contain the number and amount of all warrants so paid, their dates and the names of the payees together with a statement of the balance in the State treasury to the credit of the State dispensary on the first day of said month."

Section 710 provides as follows:

"No appropriation placed under the direction of any board of commissioners shall be drawn from the treasury until the contract entered into by the commissioners in virtue thereof shall have been lodged in the treasury."

The provisions of the Code of Laws of 1902, entitled Criminal Code of South Carolina, chapter XXVII, Violation of Laws Repealing the Sale of Spiritous Liquors, will be observed on the part of the Criminal Code, and the provisions of section 706 are in the General Statutes. The Code of Laws of 1902 contains a statement of all repealed statutes since 1882, and none of these acts have been repealed which previously governed the board.

In the State against Loftis (49 S. C., 444) the Supreme Court of South Carolina held that former dispensary acts were consistent with the act of 1902 and were not repealed.

Therefore the provision as to deposit with the State treasurer remains the same.

The criminal act became a law on the 26th day of February (see page XXI, Code of Laws, 1902), and at the same session of the legislature, on the 26th day of February, 1902, the Twenty-third Statute at Large, 1103, the following act was passed:

"No. 602. An Act Relating to Dispensary Profits.

"SECTION 1. Be it enacted by the General Assembly of the State of South Carolina: That the directors of the State dispensary shall pay over to the State treasurer by January 1st, 1904, in equal semi-annual payments, all of the school fund reported by them in excess of four hundred thousand dollars, for the benefit of the common schools of the State, to be apportioned by and paid out on the warrant of the comptroller general as is now provided by law for the apportionment and payment of dispensary profits for the benefit of said schools:

"Provided, That the first payment shall be made on the 30th day of June, 1902.

"SEC. 2. That from and after the approval of this act the directors of the State dispensary shall make quarterly settlements for the purpose of ascertaining the net profits accruing to the State from the sales made from the State dispensary and shall pay over the profits so ascertained to the State treasurer within ten days thereafter, for the benefit of the common schools of the State, to be apportioned by and paid out on the warrant of the comptroller general as is now provided by law for the apportionment and payment of dispensary profits for the benefit of said schools. The first settlement made under this act shall be on the 31st day of March, 1902.

"SEC. 3. That the county treasurers of the several counties of this State shall not pay to the authorities of the several cities and towns, entitled to dispensary profits, their share of such profits except upon the warrants of the county board of control and county auditor issued to the authorities of said cities and

towns, when settlements are made by them as required by law. The said county board of control and county auditor shall at the same time also certify in writing to the county supervisor of the county entitled to share the dispensary profits the amount thereof to which the county is entitled.

"SEC. 4. All profits from county dispensaries subject to distribution among the counties, cities and towns of the State which have accrued since the fourth Monday of December, 1901, and which may hereafter accrue, shall be distributed monthly among the counties, cities and towns entitled thereto in the proportion fixed by law, and that the settlements to ascertain the same shall be made on the fourth Monday in each month, instead of quarterly, as heretofore provided by law.

"Approved the 26th day of February, A. D. 1902."

It thus will be seen that this fund was always kept in a separate fund.

In that year, 1907 (see pages 89 and 333), the General Assembly passed a statute entitled "An Act to Declare the Law in Reference to and to Regulate the Manufacture, Sale, Use, Consumption, Possession, Transportation, and Disposition of Alcoholic Liquors and Beverages within the State and to Police the same." By the forty-seventh section of this statute "the State dispensary is hereby abolished," and "all acts and parts of acts inconsistent with this act are hereby repealed."

(3.)

An Act to Provide for the Disposition of All Property Connected with the State Dispensary, and to Wind Up Its Affairs.

SECTION 1. *Be it enacted by the General Assembly of the State of South Carolina,* That immediately upon the approval of this Act the Governor shall appoint a Commission of well-known business men, consisting of five members, none of whom shall be

members of the General Assembly, to be known as the State Dispensary Commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

SEC. 2. Said Commission shall immediately organize by the election of a Chairman and Secretary from their number.

SEC. 3. It shall be the duty of said Commission to *close out the entire business and property* of the State Dispensary except *real estate,* and including stock in the several County Dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof *all just liabilities* at the earliest date practicable. Said Commission shall be at liberty to make such disposition upon such terms, times, and conditions as their judgment may dictate: *Provided,* That no alcoholic liquors or beers shall be disposed of within this State except to County Dispensary Boards, and all liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the Attorney-General, and such expert accountants and stenographers and any other person or persons the Commission may deem necessary for the ascertainment of any fact or facts connected with said State Dispensary and its management or control at any time in the past, and to take testimony, either within or without the State: *Provided, further,* That all payments shall be made in gold and silver coin of the United States, in United States currency, or in national bank notes.

SEC. 4. The compensation of each member of said Commission shall be $5 per day for each day actually employed about the business, and actual expenses for the time engaged: *Provided,* That they shall receive no compensation for services rendered on this Commission after January 1, 1908.

SEC. 5. The said Commission shall pay to the State Treasurer, after deducting their compensation and other expenses allowed by this Act, all surplus funds on hand after paying all liabilities.

SEC. 6. The said Commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employees as they may deem necessary, and to contract with them at the time of employment for their compensation.

SEC. 7. The said Commission shall submit to the Governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the State Dispensary, and as soon as the affairs are liquidated a report in full of their actings and doings.

SEC. 8. That said Commission shall have full power and authority to investigate the past conduct of the affairs of the Dispensary, and all the power and authority conferred upon the Committee Appointed to Investigate the Affairs of the Dispensary, as prescribed by an Act to provide for the investigation of the Dispensary, approved 24th January, A. D. 1906, be, and hereby is, conferred upon the Commission provided for under this Act: *Provided*, That for the purpose of the investigation of the affairs of the Dispensary, as herein provided, each and every member of said Commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole Commission.

Approved the 16th day of February, A. D. 1907.

Discussion of the Acts.

For the information of the court, a brief history of the institution known as the State dispensary is in order.

In the year 1892 the legislature of South Carolina passed an act, which Governor Tillman promptly approved, taking away from the citizens of the State the right to engage in the liquor business, and creating a monopoly of the same under the direction and control of a board of commissioners, who

were placed in sole and absolute charge of the entire business of buying and selling malt and spirituous liquors throughout the State.

The State, in order to enable this institution to begin business, made a loan to it, and it will be noted that this was a loan provided to be repaid out of the profits, and under the provisions of the act extreme care was taken to do two things: First, to limit the profit which the monopoly would make; and, secondly, to protect the funds belonging to the institution, so that they would be safeguarded by being kept separate and apart from all other funds in the State treasury: The provision in that statute being that all amounts so received—that is to say, so received from the county dispensaries in the various counties of the State from said sales—that is, the sales made by the county dispensaries—*shall be* by him—that is, the commissioner—paid over to the treasurer of the State monthly, under such rules as may be made by the State board of control to insure the faithful return of the same, and the State treasurer was commanded, in the language of the statute, "shall keep a separate account with the said fund from which the commissioner shall draw, from time to time, upon warrants duly approved by the said board, the amount necessary to pay the expenses incurred in conducting such business.

It will be observed that this provision of the fund being kept separate and apart and being subject to draft by the commissioner upon warrants duly approved by the board of control, the then official title, is radically different from the general provision of law then existing and for many years previous and subsequent thereto, to be found in section 699 of the Code of Laws of South Carolina of 1902, page 279. "All payments by the treasurer of the State, except for interest on the public debt and the pay of members, officers and employees of the General Assembly, shall be made on warrants drawn by the comptroller-general and the vouchers for the same shall be filed in his office. The said warrants

in the hands of the treasurer, properly endorsed, shall be sufficient vouchers for the payment of the same.

There was not then nor subsequently any fund or deposit in the hands of the State treasurer, except the dispensary fund, which was not subject to this section as quoted, and in pursuance of this provision of law the fund was so deposited, so kept separate and distinct and so separately and solely drawn upon as stated.

The next act on the subject was approved on December 23rd, 1893, to be found in the Twenty-first Statutes, and in section 3 provides substantially as in the act of 1892 as to the deposit of the moneys, the keeping of a separate account of the fund and the method under which the same could be drawn.

And again, we next find the act of 1895, approved January 2 of that year, section 3 providing the same as in the act of 1892; this same section in the acts of 1893 and 1895 also providing that all rules and regulations not prescribed or provided for by law shall be prescribed by the State board of control.

Then came the act of 1896, approved on March 6 of that year, which, among other things, made the change that, instead of the county dispensaries remitting to the State dispensary, they were required to remit directly to the State treasurer, thus saving the two transfers from the county dispensary to the State dispensary and from thence to the treasury, and this act, in section 3, page 125, provides as follows:

> "Each county dispenser shall remit to the State treasurer all moneys accruing to the State from the sale of liquors under such rules as may be prescribed by the State board of control, and the State treasurer shall keep a separate account with said fund, from which the State board of control shall draw from time to time upon warrants, or in such manner as they may provide, the amount necessary to pay the expenses incurred in conducting the business. All rules

and regulations governing the said commissioner or county dispensers in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the State board of control."

So that, under this act, each county dispenser remitted to the State treasurer the proceeds of his sales, the State treasurer kept a separate account with said fund, the State board of control being commanded to draw from time to time therefrom, upon warrants or in such manner as they may provide, the amount necessary to pay the expenses incurred in conducting the business, and again provided that, in the absence of rules and regulations provided by law, the State board of control should have absolute power and authority to prescribe the same.

At the same session of the legislature, on March 9, the Twenty-second Statutes at Large, page 129, another act was passed, which reads as follows:

"An Act to Require the State Treasurer to Transmit Monthly to the State Board of Control Monthly Statements.

"SECTION 1. *Be it enacted by the General Assembly of the State of South Carolina*, That from and after the passage of this act, in order to facilitate the keeping of the accounts of the State dispensary, it shall be the duty of the State treasurer on the first days of each and every month to transmit to the State board of control a statement of all moneys received by him upon account of the State dispensary during the preceding month, and a statement of all dispensary warrants paid by him during said month, said statement to contain the number and amount of all warrants so paid, their dates and the names of the payees, together with a statement of the balance in the State treasury to the credit of the State dispensary on the first day of said month.

"Approved the ninth day of March, A. D. 1896."

The next year, on March 5, 1897, Twenty-second Statutes, page 540, the same provision substantially is re-enacted as in the act of 1896, also being section 3 of that act.

At the session of 1898 another act was passed, page 131, wherein section 9 provides as follows:

> "All moneys received by the county dispenser belonging to the State shall be forwarded on Monday of each week to the State treasurer, and at the same time the county dispenser shall forward to the State board of control a duplicate statement of the remittance so made to the State treasurer."

It will be observed that this provision compelled the county dispenser to remit on Monday of each week to the State treasurer and at the same time to forward to the State board of control a duplicate statement of the remittance so made to the State treasurer, thereby clearly giving to the State board of control the necessary information so that, in pursuance of the existing law, they could draw their warrants through their commissioner for the payment of the proper expenses and obligations of the institution.

The next act we find on the subject is one approved on the 13th of February, 1900, Twenty-third Statutes at Large, page 437, section 3 of which provides as follows:

> "The said board shall devise such a system of bookkeeping and accounting as it may deem advisable. The said board shall prescribe all rules and regulations, not inconsistent with law, for the government of the State dispensary and the county dispensaries."

Then came the Code of Laws of 1902, being a compilation made by order of the legislature, which was divided into two parts, part 1 being the general statutory provisions and part 2 consisting of the Code of Criminal Procedure and the Criminal Code. In this codification the only provisions in reference to the dispensary law are found in the Criminal Code, entitled "Criminal Code of South Carolina, chapter XXVII, Violation of Laws Repealing the Sale of Spirituous

Liquors," and there follow under this head a number of provisions of the various dispensary laws of force at the time of its passage. There is no express repeal in this code of existing laws not inconsistent therewith, but, on the contrary, this code contains a statement of all repealed statutes since 1882, and none of these acts which were then of force appear as so repealed, and therefore all provisions of a dispensary law of force at the time of the passage of the Code of 1902 not inconsistent therewith became and continued of force, and, as a matter of fact, up to the time of the dissolution of the State dispensary, the provisions of the law as to the deposit in a separate fund with the State treasurer and the drawing from that fund were steadfastly adhered to.

We find also in the general statutory provision of this Code, at section 706, the following:

> "In order to facilitate the keeping of the accounts of the State dispensary, it shall be the duty of the State treasurer, on the first days of each and every month, to transmit to the State board of control a statement of all moneys received by him upon account of the State dispensary during the preceding month and a statement of all dispensary warrants paid by him during said month, said statement to contain the number and amount of all warrants so paid, their dates and the names of the payees together with a statement of the balance in the State treasury to the credit of the State dispensary on the first day of said month."

This provision was simply the insertion in the codification of the act of March 9, 1896, which we have before referred to, in reference to the requirement that the State treasurer should transmit monthly to the State board of control monthly statements; and at the same session of the legislature when this criminal code was adopted, namely, on the 26th of February, 1902, Twenty-third Statutes at Large, 1103, we find the following act, entitled "An Act Relating to Dispensary Profits," previously set out in full.

It seems to us that this act, in addition to the mandatory character of the various acts under which the institution was created and continued, is the strongest expression of the legislative interpretation of the power and control of the directors of the State dispensary over the funds in its hands. It will be observed that section 1 provides that the directors of the State dispensary shall pay over to the State treasurer by January 1, 1904, in equal semi-annual installments, all of the school fund reported by them in excess of four hundred thousand dollars. In section 2 the directors are required to make quarterly settlements and commanded to pay over to the State treasurer within ten days thereafter the profits belonging to the school fund, thereby declaring, in no uncertain terms, that this fund was always kept separate and apart in the State treasury from all other funds, by a separate account, and was such a fund, solitary and alone, of all the funds so deposited, which was not subject to the warrant of the comptroller general, but was ever and always under the domination and control of the board.

It was for these reasons, therefore, and upon the proof presented at the time, that His Honor Judge Pritchard, the trial judge below in the Circuit Court, found as a fact as follows:

> "The said act also provided for a dispensary commissioner to be elected by the General Assembly and made it the duty of the board of directors of the State dispensary to purchase all alcoholic liquors for lawful use within the State, and to sell the same to the various county dispensaries, as provided in said act. The law further provided that all money arising from the sale of liquors by the board of directors of the State dispensary should be deposited with the State treasurer, to be held by him as a separate and distinct fund, and kept to the credit of the said board of directors of the State dispensary. That the liquors purchased by the said board of directors of the State dispensary should be paid for out of this fund upon a warrant to be issued by the said dispensary com-

missioner, such warrant to be issued by the dispensary commissioner at the direction of the said board of directors of the State dispensary, and no part of this fund could be lawfully paid out by the State treasurer, except upon warrants issued."

From this finding there has been no exception or appeal, and the record with such finding went to the Circuit Court of Appeals, and that court in its opinion, to be found in the record in this case at page 332 of the transcript, also found as follows:

"The act provided for a board of control of the dispensary consisting of the Governor, the Comptroller-General and Attorney-General, and to this board was committed the duty of conducting and managing the State dispensary. The business of the dispensary, under and by virtue of the act referred to, was inaugurated under the control of the agencies designated and became the only legalized method of dealing in intoxicating liquors within the State. Among other provisions of the act were that a State commissioner should be appointed by the Governor and that said commissioner should turn over monthly to the treasurer of the State the amount received from sales of liquors made by him, and the treasurer was required to keep a separate account of said fund, and the commissioner was authorized with the approval of the board of control from time to time to draw warrants upon the funds in the hands of the treasurer for the amounts necessary to pay the expenses incurred in conducting the business. It was also provided that in counties complying with the requirements of the act county dispensaries might be established and these latter were required to buy supplies of liquor from the State dispensary, and the State dispensary was required to sell to the county dispensaries supplies and intoxicating liquors at a profit of not more than fifty (50) per cent. At the outset there was appropriated by the State for the purpose of starting the dispensary system the sum of $50,000, which amount has since been repaid to the

State from the dispensary receipts. In the year 1896, the board of control was changed so that instead of being constituted as above set forth, it was made to consist of five members, to be elected by the General Assembly, each of said members being required to give a bond in the sum of $10,000, and the control and management of the dispensary was conferred by law upon them. This board, as above stated, was required to furnish liquor to the county dispensers and the latter were required to remit the net proceeds of the sale of liquor to the State treasurer. All bills for the purchase of liquor were paid by the State treasurer upon warrants drawn by the commissioner. Thus the sale of intoxicating liquors was conducted in South Carolina under the several acts of the legislature of that State and by the machinery provided for the purchase of liquors by the commissioner under the direction of the board of control of the State dispensary, etc."

From which finding of fact there has been no appeal or exception, so that in the consideration of this case today we have this fund so existing at the time of the passage of the act of the legislature, which is the subject of the present litigation, entitled "An act to provide for the disposition of all property connected with the State dispensary and to wind up its affairs," approved the 16th day of February, 1907.

Contemporaneously with the passage of this act was passed another act, by which, among other things, the State dispensary is abolished, the language of the forty-seventh section of that act being, the State dispensary is hereby abolished.

Taking up first the title of this act, let us examine it. It is entitled "An act to provide for the disposition of all property connected with the State dispensary and to wind up its affairs." The word "dispose" or "disposition" has been the subject of judicial interpretation frequently, and the authorities do not show any difference of opinion of the courts as to the meaning of the word. In Rogers *vs.* Goodwin, 2

Mass., 475, cited in Cook *vs.* Burham, 44 Pac., 447, the court says:

> "The words 'disposed of,' 'conveyed' and 'sold,' though not necessarily synonymous, are often used to properly describe the same transaction."

The first section of the act provides for the appointment of the commission, the second for its officers, and its third section makes it the duty of such commission to close out the entire business and property of the State dispensary, except real estate, and including stock in the several county dispensaries,—how? By disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. And then the section proceeds: "Said commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate."

We submit to the court no stronger words could be used to indicate the intent to transfer the title, the possession and the right to sell to this board.

The proviso again uses the word "disposed" and the clear intendment of the act is to transfer the title, if it were necessary for the purpose to do it, and to create these commissioners trustees of a trust fund to be converted in cash and to pay from such cash so ascertained the just liabilities of the institution.

T. Moultrie Mordecai,
Of Counsel for Respondents.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 625.

W. J. MURRAY, JOHN McSWEEN, and AVERY PATTON, constituting the State Dispensary Commission of South Carolina, *et al.*,
Petitioners,

vs.

WILSON DISTILLING COMPANY *et al.* and THE FLEISCHMANN COMPANY.

BRIEF OF GEORGE B. LESTER AND ALFRED S. BARNARD, COUNSEL FOR THE FLEISCHMANN COMPANY.

This case is in this Court on a writ of *certiorari* to review a decision of the Circuit Court of Appeals for the Fourth Circuit, affirming an interlocutory order of the Circuit Court for the District of South Carolina, granting an injunction and appointing receivers *pendente lite*.

Statement of Facts.

In 1892, the Legislature of the State of South Carolina passed an act prescribing the manner in which intoxicating liquors should be thereafter sold within the State. This act provided that within thirty days after its approval, the Governor should appoint a Commissioner who, under such rules and regulations as might be made by the State Board of Control, should purchase all intoxicating liquors for lawful sale within the State (Laws of South Carolina, 1892, p. 62). The State Board of Control was at first composed of the Governor, the Comptroller-General and the Attorney-General; but by subsequent amendments of the law, this Board was increased to five members, to be elected by the General Assembly (Laws of South Carolina, 1896, p. 123), and was afterwards changed to a Board of three, elected in the same manner and designated as the Board of Directors of the State Dispensary (Laws of South Carolina, 1900, p. 437)

It was the duty of the State Board of Control to appoint a County Board of Control, and the County Boards of Control were authorized, subject to the approval of the State Board, to make such rules as would be most conducive to the best management of the sale of intoxicating liquors in their respective counties (Laws of South Carolina, 1892, p. 64, Sec. 4). It was further provided that the County Board of Control should appoint County Dispensers, to whom permits might be issued authorizing them to keep and sell intoxicating liquors in various towns and villages in the respective counties as provided by law. These County Dispensers were permitted to purchase from the State Commissioner only; and the State Commissioner could make no sales except to County Dispensers, and he was forbidden to charge for liquor so sold more than fifty per cent. above the net cost thereof to the State Dispensary, which percentage of profit was, by subsequent legislation, reduced to ten per cent. Under this law the liquor

business in the State of South Carolina was conducted substantially as follows:

By the original Dispensary Law of 1892, and the various amendments thereto, the State Board of Directors and the State Commissioner purchased from distillers and dealers all liquors for lawful use within the State. The various County Dispensers, under rules and regulations adopted by the County Board of Control of the county in which such Dispenser was appointed, bought from the State Commissioner all the liquors necessary for use at his Dispensary, and sold the same to the consumer at such prices as were fixed by the County Board of Control. All the liquors sold by the State Commissioner to the County Dispensers, were paid for by the latter to the State Commissioner, and the money so received by the Commissioner was deposited with the State Treasurer. By subsequent amendment, the County Dispensers were required to remit the purchase price of the liquors sold to them by the State Commissioner, direct to the State Treasurer.

Under all the acts relating to the Dispensary system, the State Treasurer was directed and required to keep a separate account of all moneys received by him, either from the State Commissioner or from the various County Dispensers. From the fund thus created and set apart, the State Commissioner and the Board of Directors of the State Dispensary, drew from time to time such amounts as were necessary to pay for all liquors purchased from the various distillers and dealers, and for all other expenses incurred in the conduct of the business of the State Dispensary.

See,

Laws of South Carolina, 1892, p. 63.
" 1893, 431.
" 1894, 723.
" 1896, 125.
" 1897, 540.

All the profits realized by the County Dispensary for the sale of liquors to the consumer, were, under

the various acts, required to be divided equally between the County and the municipality in which the Dispensary was located. No part of these profits was ever paid into the State treasury, nor was the State by law entitled to them. The net income derived from the conduct of the State Dispensary was allowed to accumulate in the hands of the State Treasurer, and the General Assembly, from time to time, directed the disposition of the same. The State did not at any time, nor did the General Assembly, deal with, or assumed to deal with, any portion of the funds derived from the operation of the State Dispensary, except the net income or profits resulting from its operation, after all the debts and liabilities of the State Dispensary had been paid; and the fund was at all times held by the State Treasurer separate and apart from the general funds of the State, to be first applied to the payment of the debts incurred in the purchase of liquor and other expenses of the State Dispensary, and the balance or net income, if any, to be held subject to the disposition of the General Assembly, as provided in the Constitution of the State then in force.

The Constitution of 1895 restricted the appropriation or use of any part of the State Dispensary funds, except the net income or profits remaining in the hands of the State Treasurer, after the payment of the debts and the payment of the necessary running expenses (see Constitution, South Carolina, Art. 11, Sec. 12).

From and after the passage of the Act of 1892, all persons were prohibited from engaging in the manufacture or sale of any kind of intoxicating liquors within the State; and the method above described, which became known as the Dispensary System, became, and continued to be, until the passage of the two acts of 1907 hereinafter referred to, the only legitimate way of carrying on the liquor business in South Carolina.

While these laws were in force and the State Dis-

pensary was still engaged in business, the complainants sold and delivered to it in the manner provided by law, a large quantity of whiskey and other liquors. The prices at which these sales were made were entirely reasonable and mutually satisfactory, and all of the said liquors were received and accepted by the Board of Directors of the State Dispensary, who agreed to pay for the same.

At the time of the passage and approval of the Act of 1907, hereinafter referred to, all of the whiskey and liquors, the price of which the complainants are seeking to recover in this cause, had been by the State Dispensary resold, at the profit allowed by law, to the various county dispensaries, and the county dispensaries had either paid the proceeds thereof into the hands of the State Treasurer, or were indebted to the State Dispensary therefor.

In 1907, the General Assembly passed an act entitled, "An Act to declare the law in reference to and regulate the manufacture, sale, use, &c., of liquors and beverages within the State and police the same." By Section 47 of this Act, the State Dispensary was abolished, and at the same session another act was passed, and approved on February 16th, 1907, entitled "An Act to provide for the disposition of all property connected with the State Dispensary and to wind up its affairs."

In order to carry out the provisions of this last mentioned Act, the Governor was authorized and directed to appoint a Commission of five business men, whose duty it should be "to close out the entire business and property of the State Dispensary, * * * by disposing of the goods and property connected therewith, by collecting all debts due, and *by paying from the proceeds thereof all just liabilities at the earliest date practicable.*" It was left entirely to the Commission to make such disposition upon such terms, times and conditions as their judgment might dictate, and said Commission was authorized to return to the persons, firms and corporations from whom the

liquors had been purchased, such liquors as had been illegally bought by the former management. For the purpose of determining what liquors, if any, had been illegally bought, the Commission was authorized to make investigations as provided in said Act.

Within a short time after the passage and approval of this Act of 1907, providing for the winding up of the affairs of the State Dispensary, the defendants, W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton were appointed Commissioners, and said defendants having duly qualified and organized pursuant to said Act, became, and at the time of the institution of this suit, were and do now constitute the State Dispensary Commission, and as such are charged with the execution of all the powers conferred, and the performance of all duties imposed by said Act.

Immediately upon their qualification as Commissioners and organization as the State Dispensary Commission, the defendants entered upon the discharge of their duties, and at once took possession and control of the entire business and property, excepting the real estate, of the South Carolina State Dispensary. The property which passed into the hands of the Commission from the Board of Directors of the State Dispensary by virtue of the Statute of 1907, consisted of cash in the hands of the State Treasurer amounting to about $150,000, the various accounts payable by the County Dispensaries to the State Dispensary, and large quantities of alcoholic liquors on hand, which the State Dispensary had not sold. The liabilities consisted almost entirely of accounts due to various distillers and liquor dealers throughout the country, for alcoholic liquors which had been sold by them to the State Dispensary, and for which the State Dispensary was indebted. The cash balance of about $150,000, which was in the hands of the State Treasurer to the credit of the Board of Directors of the State

Dispensary was turned over to the defendants, placed by them to their credit in bank, and constitutes a part of the fund now in their hands. The said defendants have, in accordance with the Act providing for their appointment, sold all the property of the State Dispensary authorized by said Act to be sold, and have collected all of the debts due to it, and the moneys realized from such sale and collections, have been from time to time, as received by said defendants, deposited to the credit of the State Dispensary Commission in various banks; and there was at the commencement of this suit, and now is or ought to be, less such sums as have been, by orders made in this cause, withdrawn, in said banks to the credit of the said Commission, and subject to withdrawal by it only, about $834,000. All of this sum is in the possession and control of the said defendants; no part of it is in the State Treasury, nor has any of it ever been mingled with any of the funds belonging to the State of South Carolina.

At the time the defendants took possession of the property of the State Dispensary, there was on hand as part of the large quantities of whiskeys and other liquors which had been bought from various individuals, firms and corporations, a quantity of whiskey and other liquors which had been purchased from The Fleischmann Company, and the defendants thereupon requested said Company to take back such goods as had been purchased from it and which had not been sold by the State Dispensary, and held out to The Fleischmann Company as an inducement for so doing that it would enable the Commission to more rapidly dispose of the goods on hand, and would facilitate a settlement of the affairs of the State Dispensary, and enable the Commission to make a much earlier payment of its liabilities. Thereafter The Fleischmann Company furnished to the Commission at its request an itemized statement of the accounts held by it against the State Dispensary, and the Com-

mission notified said Company that there was a discrepancy between the amount claimed by said Company, and the amount shown to be due by the books of the Dispensary, of $292.14, and claimed that the State Dispensary was entitled to a credit of that amount, at the same time stating that the account furnished by The Fleischmann Company had been audited, and that it corresponded substantially with the accounts kept by the State Dispensary, and that if the said Company would take back the goods above referred to, and give the State Dispensary credit for the said sum of $292.14, there would remain due and owing to The Fleischmann Company the sum of $66,561.19, which sum the Commission agreed to pay. That in consideration of the agreement and promise of the Commission to pay this amount, The Fleischmann Company took back all of the goods remaining on hand, and gave credit therefor at the invoice prices, and allowed the Commission a credit of the $292.14.

Thereafter said The Fleischmann Company made frequent applications to the Commission for the payment of its claim, but notwithstanding the defendants have realized from the sale of the property of the State Dispensary, and from the collection of the debts due to it, and have to their credit in bank together with the sum which had been received from the State Treasurer, the sum of about $834,000, which was more than sufficient to pay the claims of all the creditors and all liabilities of the State Dispensary, the Commission declined and refused to pay the claim of The Fleischmann Company or of any other creditor.

Thereafter and on the 23d day of January, 1908, The Fleischmann Company filed its bill of complaint (Record, p. 17), on which a notice to show cause was issued, returnable before the United States Circuit Court Judge at Asheville, North Carolina, on January 29, 1908 (Record, p. 29), and on the following day, it having been made to appear to the Court that the Commission threatened to divert the funds,

a restraining order was issued (Record, p. 23). On the return day of this notice to show cause, the defendants constituting the State Dispensary Commission, appeared in this action by J. Fraser Lyon, Attorney General of the State of South Carolina, as their counsel, and filed what was designated as a return, in which they attacked the jurisdiction of the Court, and answered generally to the allegations of the bill (Record, pp. 41–51). After argument, and on February 29, 1908, the United States Circuit Court handed down its decision and entered an order directing that an injunction *pendente lite* should issue in accordance with the prayer of the bill (Record, p. 86); the opinion of the Court upon the question involved being filed on the 5th day of March, 1908 (Record, p. 88).

On the 19th day of February, 1908, the Wilson Distilling Company and others, who had theretofore brought suit against the Dispensary Commission, filed an amended and supplemental bill (Record p. 105), on which a notice to show cause was issued, returnable on the 29th day of February, 1908 (Record, p. 122), and the hearing on this motion was postponed until March 7th, 1908 (Record, p. 143). It having been made to appear to the Court on March 6th, 1908, that there was danger of the fund in the hands of the Commission being diverted, an order was entered appointing temporary receivers (Record, p. 189), and on the hearing on the following day, the two causes of the Wilson Distilling Company and the Fleischmann Company were consolidated, and upon the evidence in both causes, the Court ordered that an injunction *pendente lite* should issue, and appointed permanent Receivers to take charge of and administer the funds in the hands of the Commission (Record, p. 190). From this order an appeal was taken to the United States Circuit Court of Appeals, and the order was affirmed, the opinion appearing in this Record on page 331.

It further appears from the Record that after this suit had been commenced in the United States

Circuit Court, and after the Circuit Judge had announced his decision, the General Assembly of the State of South Carolina did on the 24th day of February, 1908, pass an act appropriating the sum of $15,000 to meet the expenses of certain criminal prosecutions that had been commenced against certain persons charged with violations of the State Dispensary law, and directed that the said sum of Fifteen thousand dollars should be paid into the State Treasury by the State Dispensary Commission "out of any funds in its hands arising from the business or property of the State Dispensary" (Laws of South Carolina, 1908, p. 1369, 1370). Thereafter and on the 27th day of March, 1908, J. Fraser Lyon, the Attorney General of South Carolina, as petitioner, filed a petition for a writ of mandamus in the Supreme Court of the State of South Carolina, against W. J. Murray and others, constituting the State Dispensary Commission, in which proceeding the petitioner prayed that an order should be issued from the Supreme Court requiring the Dispensary Commission to turn the sum of $15,000 into the State Treasury of the State of South Carolina, in accordance with the terms of the Act appropriating the same, above referred to (Record, p. 232). The Dispensary Commission appeared by W. F. Stevenson, their attorney, who also appears as counsel for the Commission in this suit, and filed a return setting up the various injunction orders issued by the United States Circuit Court in this action, and claiming that the Commission could not by reason of the injunction pay out any of the funds in its hands (Record, p. 235). Upon this petition, and the return of the defendants, and the traverse to said return, the Supreme Court of South Carolina rendered a decision construing the Act of February 16, 1907, providing for the winding up of the affairs of the State Dispensary, and holding that this suit was in effect a suit against the State of South Carolina, and that the injunction orders issued herein were void and of no

effect, the United States Circuit Court having no jurisdiction (Record, pp. 280–296).

Thereafter a motion was made before the United States Circuit Court to vacate the order continuing the injunction and appointing Receivers. This motion was heard on the 27th day of March, 1908, and was denied (Record, pp. 298–301). On the same day an order was entered directing the Dispensary Commission to pay to the Attorney General of South Carolina the sum of $15,000, upon his application therefor (Record, p. 307).

It further appears from the record that after the filing of the bill in this cause and the issuing of a temporary restraining order, the defendants appeared by J. Fraser Lyon, Attorney General of South Carolina, and moved that they be allowed to pay out of the funds in their hands a sum sufficient to pay the necessary expenses incurred in the administration of the said fund, not exceeding the sum of $15,000, on which motion an order was made in this cause directing said payment (Record, p. 41).

Thereafter, on the 5th day of March, 1908, the defendants again appeared and joined in the petition of various creditors, whose claims the Commission had compromised, to be allowed to pay the amounts which said Commission had agreed to pay said creditors respectively in settlement of their claims (Record, pp. 156–171). Thereupon an order was made directing said payment (Record, p. 172). On November 18th, 1908, a petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals in this cause was filed in this court, which petition was allowed.

The several assignments of error of the petitioners present three questions.

> First; Does the Act of the General Assembly of the State of South Carolina of February 16th, 1907, create a trust and divest the State of the title and control of the State Dispensary property?

Second; Is this a suit against the State of South Carolina?

Third; Is the State of South Carolina an indispensable party to this suit?

ARGUMENT.

1. THE ACT OF FEBRUARY 16, 1907, PROVIDING FOR THE DISPOSITION OF ALL THE PROPERTY CONNECTED WITH THE SOUTH CAROLINA STATE DISPENSARY AND TO WIND UP ITS AFFAIRS, CREATED A TRUST, AND THE FUNDS IN THE HANDS OF THE COMMISSION ARE A TRUST FUND HELD BY THEM FOR THE BENEFIT OF THE CREDITORS OF THE STATE DISPENSARY.

By an Act of the General Assembly of the State of South Carolina, passed concurrent with the Act creating the Dispensary Commission, the State Dispensary was abolished (Sec. 47, Laws of South Carolina, 1907, p. 480). The Act creating the Dispensary Commission is set forth in full in the bill of complaint (Record, pp. 18–20). By the terms of this Act the Governor was directed to appoint a Commission consisting of five members, to be known as the State Dispensary Commission. This Commission was directed to organize by the election of a Chairman and a Secretary from their number. The term of office of this Commission is not stated in the Act. The Act declares that it shall be the duty of the Commission to close out the entire business and property of the State Dispensary, except the real estate (including the stock in the several county dispensaries), by disposing of all goods and property connected therewith, by collecting all debts due, and by paying from the proceeds thereof all just liabilities at the earliest date practicable. It was left to the judgment of the Commission to decide when and upon what terms and conditions the property should be disposed of, the only restrictions being that no alcoholic liquors should be disposed of by the Commission within the

State of South Carolina, except to County Dispensary Boards; and that all liquors which had been illegally bought by the former Board of Directors of the State Dispensary might be returned to the persons, firms or corporations, from whom purchased. The Commission was given full power and authority to investigate the past conduct and affairs of the State Dispensary, and all the power and authority conferred upon the Committee appointed to investigate the affairs of the Dispensary as prescribed by an Act to provide for the investigation of the Dispensary, approved January 24, 1906.

The Committee referred to in this Act was a Committee appointed by the Legislature to investigate the alleged misconduct of the former Boards of Directors and officials of the State Dispensary. The Commission was given no power to investigate or pass upon the legality or illegality of the claims of the creditors, except in so far as those claims related to goods remaining in the hands of the Dispensary Board at the time the State Dispensary was abolished, which unsold goods had come into the hands of the Dispensary Commission by the Act appointing them. The Act provided with reference to such unsold goods as follows:

> "SECTION 3 All liquors illegally bought by the present management may be returned to the persons, firms or corporations from whom purchased, *and in determining the legality of the said purchases* they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors," &c.

As has been seen, the property which came into the hands of the Commission, aside from the cash which was turned over to it by the State Treasurer, consisted of accounts payable to the State Dispensary from the various county dispensers, together with the unsold liquors remaining on hand at the time the Commis-

sion took possession, and the liabitities were the amounts due and owing to the creditors. As to the liquors which had been sold by the old Boards of Directors to the various county dispensaries, these had all been sold at a profit, and were represented by the accounts payable. The State had no further interest in the identity of these goods or their disposition, or as to whether or not the transaction as between the distillers or dealers from whom they had been purchased and the old Board of Directors was legal or illegal. The goods had been sold and the profits had been made by the State Dispensary. The parties could not be placed in *statu quo*. The Dispensary had been abolished with its Board of Directors and Commissioner, and the identity of the goods had been merged into debts against the County Dispensers, which debts were by the Act made payable to the Commission. As to the goods on hand, however, the Commission held the property, although the same may have been duly purchased according to law, and the State Dispensary was justly indebted for the payment of the purchase price of the same to the distillers and dealers. As to these goods, they were authorized to investigate the legality of their purchase, the object being if such goods had not been purchased according to the requirements of the law, or fraud had been practiced upon the former Boards of Directors of the Dispensary, that defense could, to the extent of the goods remaining, be interposed by the Commission to any action brought by a distiller or dealer for the recovery of their purchase price. When, as occurred in this case, The Fleischmann Company took back without question all unsold goods for the purpose of facilitating the liquidation of the Dispensary affairs, nothing remained to be done by the Dispensary Commission but to bring into reconciliation the accounts of the Company with the Dispensary books, and this having been done (as admitted by the defendants in their return before referred to), there was nothing left but the plain ministerial

duty on the part of the Commission to pay this Company's debt.

The same practice as to the return of unsold goods was adopted in the case of every creditor. The Commission returned the goods which they could not sell to the County Dispensers, converted the remainder into cash, collected all the debts due and owing from the various County Dispensers throughout the State, and completed the liquidation of the Dispensary property in accordance with the provisions of the Act.

The fund resulting from this liquidation was made up entirely from a sale, by the old State Dispensary Boards and by the Dispensary Commission, of liquors to the County Dispensers throughout the State, all of which liquors had been supplied by the very creditors who are now seeking in this suit to obtain payment of the agreed purchase price of the same.

Under the provisions of the Act the Commission has held and now holds this fund for two purposes. First, for the payment of the liabilities and the expenses of the liquidation; and, second, to pay to the State Treasurer, after all liabilities and expenses have been paid, the surplus, if any, Section 5 of the Act providing: "The said Commission shall pay to the State Treasurer, after deducting their compensation and all other expenses allowed by this Act, all surplus funds on hand, after paying all liabilities." It will be observed that the Act does not authorize the withdrawal, by the State Treasurer or any State official, of any portion of these funds, but provides that the Commission, which has title and ownership for the purposes of the Act, shall, after all liabilities have been paid, pay to the State Treasurer any surplus. The State of South Carolina has no present right in any of the funds in the hands of the Commission, and can have no right to any of the funds until all the liabilities have been paid. A reference to the former Acts creating and continuing the Dispensary system in the State of South Carolina, will

show that at no time since the establishment of the Dispensary, has the State had any authority or control over the property or corpus of the Dispensary funds until after all the debts and liabilities had been paid, when, under the former acts, the General Assembly was entitled to dispose of the net income or profits of the institution. At all times the general fund resulting from the operations of the State Dispensary was subject to withdrawal from the depositary by the State Board of Control and later by the Board of Directors of the State Dispensary for the purpose of paying the debts and liabilities and expenses of operation of the State Dispensary. No part of such funds except the net profits was ever subject, under any of the dispensary laws, to the control of the State or State officials. The creation of the defendants as a State Dispensary Commission, and the direction that they should pay out of the Dispensary property coming into their hands all of the just liabilities of the State Dispensary, was but a continuation of the previous policy of the State to set aside the Dispensary funds to be used primarily for paying all debts incurred in conducting the Dispensary system.

It is clear that if an individual debtor had by a written instrument similar in terms to the Act of 1907, creating the Dispensary Commission, placed property or funds in the hands of another to be used as directed in said Act, the persons in whose hands the property or fund was placed would become a trustee. If we eliminate then all of the foreign matter which has been dumped into this case, get rid of the political features of it, and shut out the hue and cry about State rights, it will be seen that this is a plain every-day suit in equity, brought by a *cestui que* trust, to compel a trustee, holding property for his benefit, to perform the duties imposed upon him by the instrument creating the trust; a suit brought solely for the purpose of settling a dispute between a *cestui que* trust and a trustee as to the amount legally

due to the *cestui que* trust out of the funds in the hands of the trustee. The only novel feature in this case, and that is more apparent than real, is that the trust was created by a State. But this is not new and involves no new principle, as it has been frequently held that a State or sovereign can create a trust and that a trust so created is enforceable in a court of equity.

Perry of Trusts, 5th Ed. Sec. 30.

Beach on Trusts and Trustees, 1897 Ed. Sec. 3.

Commissioners *vs.* Walker, 6 How. (Miss.) 143.

Board of Liquidation *vs.* McComb, 92 U. S. 541.

Chaffriax *vs.* Board of Liquidation, 11 Fed. 638.

Swasey *vs* N. C. RR. Co., 23 Fed. Cas. 518.

The same principle is clearly recognized in Louisiana *vs.* Jumel, 107 U. S. 711.

Vose *vs.* Internal Improvement Fund, 28 Fed. Cas. 1226.

Ford *vs.* Delta & Pine Land Co., 164 U. S. 662.

As was said by this Court in McKee *vs.* Lemon, 159 U. S. 317, "There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which may be enforced by a bill in equity if not by an action at law. The acceptance of money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor."

See also

Bearing *vs.* Dabney, 16 Wall. 1.

Clews *vs.* Jamieson, 182 U. S. 461 (479, 480).

In Gibbs *vs.* Green, 54 Miss. 592, the Supreme Court of Mississippi, in discussing the enforcement of a legislative act directing that certain taxes should be raised upon land which had been benefitted by the construction of a levee in that State, held that the taxes which had gone into the hands of the Commissioners appointed to collect the same was a trust fund, and that the act created between the State and the holders of certain bonds which had been issued for the purpose of obtaining the money for constructing the levee an inviolable contract, and declared that so long as the Court could find persons or machinery by which such an obligation could be enforced, no measures would be left untried to compel performance.

"It is true that cases have arisen where, owing to peculiar facts and circumstances, it has been found impossible to administer relief, but this occurred solely because there were no functionaries upon whom the Court could act." The Court further held that the fact that the Levee Commissioners and their successors, the Auditor and State Treasurer, were vested by the Act with power to sell the land, did not divest the Court of Chancery of its inherent jurisdiction to administer the trust fund for the benefit and upon the application of the *cestui que trust.*

The principle of this case was approved by this Court in Ford *vs.* Delta and Pine Land Co., 164 U. S. 662 (675).

In the case of Maenhaut *vs.* City of New Orleans, 2 Woods, the General Assembly of Louisiana passed an Act providing for a commission of five officers of the City of New Orleans, called the Commissioners of the Consolidated Debt of New Orleans. These Commissioners were authorized to issue bonds of the City and to exchange these bonds for any of the old obligations or debts of the municipality, or to sell the same, and with the proceeds, pay off the debts. The Act further provided for the levying of a special tax on real estate, to be called the Consol-

idated Loan Tax and directed that these taxes should be applied to the interest on the bonds.

A suit was brought by one of the bondholders to enjoin the City from using the money and to have the same applied to the purposes for which it was collected. ——Woods, Circuit Judge, issued the injunction, and in the course of his opinion said: "In my judgment there is no doubt that the City can be enjoined. The money especially collected to pay this interest is deposited in bank to the credit of the fund for that purpose, and having been especially collected under authority of the law to pay this interest, and deposited in bank to the credit of a fund set apart for such payment, it is held by the City in a fiduciary capacity, and a trust is imposed upon the City to apply the funds to the object for which they were collected. It is a trust which equity can enforce." It was further held that "A Court of Chancery will always lay hold of any breach of trust in relation to the administration of property, let the party guilty of it be either in a public or private capacity."

But it is further contended, in this case, that the members of the State Dispensary Commission are officers of the State of South Carolina. They were certainly no officers prior to their appointment as Commissioners, and it is plain that the Act of 1907 does not make them officers. The trust was reposed in them not as officers of the State, but as individuals. The Act fixed no time during which they should hold their positions, nor were they required to take an oath of office.

The Constitution of South Carolina, Article 3, Section 26, provides that all members of the General Assembly, "and all officers, before they enter upon the duties of their respective offices, shall take and subscribe the following oath" &c.; and by Article 1, Section 2, of the said Constitution, it is provided that "The terms of all officers shall be for some specified period, except Notaries Public and officers in the militia."

It is obvious that the Act intended that the Commission should be composed of business men, appointed for the purpose of winding up a business institution according to the ordinary methods of liquidation. The Act created the trust and left it to the Governor to appoint the Trustees. These Trustees were appointed primarily to look after the interests of the creditors, as they were required to pay all just liabilities at the earliest date practicable.

The appellants further contend that in the construction of the Act of 1907, this Court is bound by the decision of the Supreme Court of South Carolina, construing said Act, and that that Court having held that by the said Act the State of South Carolina did not divest itself of the title and possession of the funds in the hands of the Commission, this Court must follow that decision.

The record shows that this decision was rendered in a proceeding in the Supreme Court of South Carolina to which these complainants were not parties, and after the complainants had filed their bills in the United States Circuit Court for the District of South Carolina, and that court had taken jurisdiction and construed the Act of 1907. The complainants were therefore entitled to the independent judgment of the United States Circuit Court in construing that Act; and this case is not within the rule which requires this court to follow State decisions in the construction of State statutes.

Pease *vs.* Peck, 18 Howard, 595.

Burgess *vs.* Seligman, 107 U. S. 20 (33).

Carroll County *vs.* Smith, 111 U. S. 556.

Anderson *vs.* Santa Anna Trp. Co., 116 U. S. 356.

Pleasant Improvement Co. *vs.* Ætna Life Ins. Co., 138 U. S. 67.

These cases are all cited with approval in a very exhaustive opinion on this question, delivered by Mr. Justice Harlan in the case of Great Southern Hotel Co. *vs.* Jones, 193 U. S. 533, and in this case it is said, "The only exception to the general rule announced in the above cases arises when the qestion is whether a particular statute was passed by the Legislature in the manner prescribed by the State Constitution so as to become a law of the State."

See also, Wicomico County *vs.* Bancroft, 203 U. S. 112.

All the cases cited by the petitioners, to the effect that this Court must follow the construction placed by the Supreme Court of the State upon State statutes, were writs of error direct from the State courts to review the decision in which the statute was construed, and therefore have no application.

3. THIS IS NOT A SUIT AGAINST THE STATE.

The foregoing authorities establish beyond question that the fund in the hands of the State Dispensary Commission, out of which the complainants are seeking to have their debts paid, is a trust fund, and we come to the next question as to whether or not a suit to enforce this trust is a suit against the State of South Carolina.

The State is not a party, nor are the complainants seeking any relief against it. The only theory upon which it can be said that this is a suit against the State is that the defendants, constituting the State Dispensary Commission, are officers of the State, and that a suit against them is a suit against the State.

This suit is brought by the complainants as creditors of the State Dispensary to compel the defendants to perform specific duties which the Legislature of the State has directed them to perform. The purpose of the suit is not to require the

defendants to do that which the law of the State forbids, but to compel them to do what the statute says they shall do.

Ralston *vs.* Crittenten, 120 U. S.

"The Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is of necessity limited to those suits in which the State is a party to the record. In deciding who are parties to a suit the Court will not look beyond the record. Making a state officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest."

Osborne *vs.* Bank, 9 Wheaton, 738.
Davis *vs.* Gray, 16 Wallace, 220.
U. S. *vs.* Lee, 106 U. S. 196.
Board of Liquidation *vs.* McComb, 92 U. S. 541.

It may be contended that this doctrine has been modified in more recent cases in which it is declared that the Court will, in determining who are the real parties to the suit, look beyond the record; as in the cases of

Louisiana *vs.* Jumel, 107 U. S. 711.
Cunningham *vs.* Macon &c. R. R. Co., 109 U. S. 455.
Hagood *vs.* Southern, 117 U. S. 70.
In re Ayres, 123 U. S. 492.

But there is a broad distinction between those cases and the case at bar. In those cases there was no trust created, and there was no specific fund which the complainants were seeking to reach.

It will be noted here, that the state is not claiming any interest in the fund in the hands of these defendants, and in order to enforce the trust

imposed by the Act of 1907, the State is neither a necessary nor indispensable party.

Pennoyer *vs.* McConnaughy, 140 U. S. 1.

Swasey *vs.* N. C. R. R. Co., 23 Fed. Cas. 518.

Chaffraix *vs.* Board of Liquidation, 11 Fed. 632.

Tindell *vs.* Wesley, 167 U. S. 220.

The case of Louisiana *vs.* Jumel (*supra*), on which the appellants so strongly rely, was a suit brought against the Governor, Lieutenant-Governor, Auditor, Treasurer, Secretary of State and Speaker of the House of Representatives of the State of Louisiana, to compel them, as constituting the Board of Liquidation of that State, to apply certain money in the treasury to the payment of the interest coupons on certain State bonds. In 1874 an Act had been passed providing for the issue of bonds, and the collection of taxes with which to pay the interest on said bonds; but it will be observed that no duty with reference to the fund raised from such taxes and the payment of the interest coupons was imposed upon the Board of Liquidation; nor were they the custodians of the funds.

On January 1, 1880, a new constitution went into effect in Louisiana, by which it was provided that the coupons falling due on January 1, 1880, should be remitted and any interest taxes collected to meet said coupons were transferred to defray the expenses of the State Governor, and at the time the suit was instituted the fund was in the treasury. It was held that the suit could not be maintained because the defendants were charged with no duty with respect to the fund sought to be reached. "The individual defendants are the several officers of the State who under the law compose the Board of Liquidation. That Board is in no sense a custodian of the fund. It had nothing to do with levying the tax, collecting the money, paying it out, &c.

The case is distinguished from Bd. of Liq. *vs.* McComb, 92 U. S. 531, "which," says the Court, "arose under the same Act of 1874 that we are now considering; the Board of Liquidation was enjoined at the instance of bondholders from admitting to the privileges of the compromise proposed by the State certain persons other than those originally provided for and on different terms, but this clearly because the Board of Liquidation was by the very terms of the law charged with the duty of exchanging the bonds specifically set apart by the contract for a particular purpose, and every *bona fide* bondholder by accepting the compromise offered became personally interested in securing the due administration of the trust which had thus been committed to the Board. In fact, the Board held the new issue of bonds in trust, and everyone who gave up his old obligations and accepted the new in settlement became a beneficiary under the trust and might act accordingly.

In this case, however, there is no such trust. As has already been said, the Board is charged with no duty in respect to the taxes, &c. * * * The law has never made it a part of their official duty to separate from the other moneys in the treasury that which was realized from the taxes in question and hold it in trust for the bondholders."

This was an effort to compel the State officers to do that which they were by law expressly prohibited from doing.

"But it has been well settled that where a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the

writs of mandamus and injunction are somewhat correlative to each other."

Bd. of Liq. *vs.* McComb, 92 U. S 531,
Pennoyer *vs.* McConnaughy, 104U. S. 1.

This distinction is also drawn in the two cases of Swasey *vs.* N. C. RR. Co., *supra,* and Christian *vs.* A. & N. C. RR. Co., 133 U. S. 233.

In the first case, the State of North Carolina had authorized the issue of certain bonds with which to build the North Carolina Railroad; it became a subscriber to the capital stock of the Railroad Company to the extent of the money put in, and as security for the bonds pledged the stock. While this stock was still in the hands of the corporation, and before it had been issued to the State, a suit was brought by the bondholders on whose bonds the interest had not been paid, to foreclose the lien on the stock, and to apply the dividends belonging to the State to the payment of the interest. The case was heard before Chief Justice Wait at Circuit, who, it will be noted, delivered the opinion in the Jumel case (*supra*), and he decided that the property, not having gone into the State Treasury, and it being still in the hands of the original pledgee, the suit to enforce the pledge was not a suit against the State of North Carolina.

In the Christian case (*supra*), which was based upon a very similar state of facts, the stock had been issued to the State and was in the State Treasury; and in order to transfer the stock to any purchaser who might buy at a foreclosure sale, it was necessary to have the State, which was the owner of the stock, before the Court. Following the decision in the case of Cunningham *vs.* Macon, &c., R.R. Co., *supra,* this Court held that inasmuch as the title to the property was in the State, and no transfer could be made without the presence of the State, the suit was in effect against the State, and could not be maintained.

This was also the case in Cunningham *vs.* Macon, &c., R.R. Co., *supra.* There a suit was brought

to foreclose a mortgage on certain property, the title to which was in the State of Georgia, and this Court held that no transfer could be made without the presence of the State, which held the legal title, and therefore the suit was within the inhibition of the Eleventh Amendment.

The cases on this subject have been recently cited and commented upon by this Court in the Matter of Edward T. Young, 209 U. S. 158, in which this Court held that a suit to enjoin the Attorney-General of the State of Minnesota from prosecuting criminal actions for violation of a law fixing railroad rates within the State, was not a suit against the State. If a suit against the Attorney-General of a State to restrain him from doing what the law of the State expressly requires he shall do is not a suit against the State, how can it be contended that a suit to compel a trustee appointed by the State to perform a ministerial duty is a suit against the State within the Constitutional amendment? But the defendants, as heretofore argued, are not officers of the State. They are simply agents, if anything, appointed solely for the purpose of carrying out specific duties. They are certainly not general officers of the State in such a sense that a suit against them is a suit against the State within the inhibition of the Eleventh Amendment.

Western Union Tel. Co. *vs.* Myatt, 98 Fed. 335.

Affirmed, Atlantic C. L. RR. Co. *vs.* Virginia Corporation Commission, 211 U. S.

3. Is the State an Indispensable Party?

The State is not claiming any interest in the fund in the hands of the Commission, nor is it entitled to any part of the fund until all of the just liabilities of the old State Dispensary are discharged, and the expenses incident to the carrying out of the Act of 1907 deducted. The only suggestion of an interest in the State comes from the petitioners

themselves, who, in their so-called return, contend that they hold the money as the property of the State. But it is well settled that if the State is not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction, even though some interest of the State may be affected by the decision.

United States *vs.* Peters, 5 Cranch, 136.
Louisville, &c., RR. Co. *vs.* Leston, 2 Howard, 551.
Bank of U. S. *vs.* Planters Bank of Ga., 9 Wheaton, 904.

And certainly it cannot be alleged that a mere suggestion of title in the State of property in the possession of an individual must arrest the proceedings of the courts, and prevent their looking into the suggestion and examining the validity of the title.

Tindell *vs.* Wesley, 167 U. S. 220.

See also,

Gunter, Attorney-General, &c. *vs.* Atlantic C. L. RR. Co., 200 U. S. 273.

The test of indispensable parties, as was said by this Court in Horn *vs.* Lockhart, 17 Wallace. 579, is whether their interests are so interwoven and bound up that no decree could be made without necessarily affecting them; and it is only the presence of parties thus situated which is essential to the jurisdiction of the Court. The question is, or always should be, whether to a decree authorized by the case presented, the party who is not before the Court is an indispensable party, for if the interests are severable, and a decree without prejudicing that party's rights can be made, the jurisdiction of the Court should be retained.

In Elmendorf *vs.* Taylor, 10th Wheat, 152 (166-167), Chief Justice Marshall, discussing the question of necessary parties to a suit in equity, uses this language:

"Courts of Equity require that all the parties concerned in interest shall be brought before them

so that the matter in controversy may be finally settled. This equitable rule, however, is framed by the Court itself and is subject to its discretion. It is not, like the description of parties, an inflexible rule a failure to observe which turns the party out of court because it has no jurisdiction over the cause, but, being introduced by the Court itself for the purposes of justice, is susceptible of modification for the promotion of those purposes. In addition to these observations, it may be proper to say that the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable in most cases to the courts of the United States, is not applicable to all In the exercise of its discretion the Court may require the plaintiff to do all in his power to bring every person concerned in interest before the Court. But if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the Court cannot reach, ought not to prevent a decree upon its merits. It would be a misapplication of the rule to dismiss the plaintiff's suit because he has not done that which the law will not enable him to do."

Could there be a case to which this rule, adopted in the interest of justice, is more applicable than the case at bar? The law will not permit the State of South Carolina to be sued. The State, recognizing the obligation of the State Dispensary to the complainants and others from whom the Dispensary Agent has purchased goods, from the sale of which a profit has been realized, determines to treat fairly all creditors holding just liabilities. To this end it placed in the hands of the defendants, commissioners, sufficient property with which to pay all the debts of the State Dispensary, and directed that the proceeds arising from the sale of the property should be so applied. The commissioners refuse to carry out this direct command of the State. Is it possible that a Court of Equity, having full power

to adjudicate all questions at issue between the parties before the court, will refuse to entertain the suit, leave the complainants remediless and permit a great injustice to be done upon the mere suggestion of the defendants that the State has an interest in the fund and should be made a party, when the State itself, although ample opportunity has been afforded it so to do, refuses to intervene and set up its interest and when to make the State a party without its consent would defeat the jurisdiction of the court? The Attorney General of the State appears upon the record as counsel for the commissioners. If this did not in effect make the State a party what more could the State do to protect its interest even if it were actually a party by name? In this case the State clearly belongs to that "class of persons having such relations to the matter in controversy merely formal or otherwise, that while they may be called proper parties the court will take no account of the omission to make them parties," or to that other "class of persons whose relations to the suit are such that if their interest and their absence are formally brought to the attention of the court it will require them to be made parties if within its jurisdiction before deciding the case. But if this cannot be done it will proceed to administer such relief as may be in its power between the parties before it."

But even if it be conceded that the State has an interest in the fund in the hands of the Commission, it is an interest subordinate and secondary to the rights of creditors holding just liabilities. It is not, therefore, that kind of interest which must be represented before the court and the absence of which representation will prevent the court from deciding as between the complainants and the defendant commissioners what are the just liabilities of the State Dispensary which ought to be paid under the provisions of the Act of 1907.

In Dandridge *vs.* Washington's Executors, 2 Pet. 370, a will had been executed providing for the education of certain nephews of the testator. Among other things, the will provided that after the testator's debts and legacies had been paid, and the education of the nephews completed, the residue of

the estate should be equally divided between certain persons thereafter named. A suit was brought by one of the nephews to compel the executors to contribute more than they were contributing towards his education and support. It was contended that the bill should be dismissed, because the residuary legatees were necessary and indispensable parties. In dealing with this contention, Chief Justice Marshall, delivering the opinion of the Court, said:

"In a suit for the distribution of this fund, we do not think the residuary legatees necessary parties. They have undoubtedly an interest in reducing the sums to be allowed out of it to the complainant, but they have the same interest in reducing every demand on the estate. Whatever remains sinks to the residuum, and that residuum is diminished as well by the claims of creditors and specific legacies as by this. In all such cases the executors represent the residuary legatees and guard their interests. It is a part of their duty which requires them to protect the interest of the estate. In such suits the residuary legatees are never made parties."

This case is clearly analogous to the case at bar. The principal reason suggested for the contention that the State should be made a party, is that the State is entitled to the surplus after all the just liabilities and expenses are paid, and it is to the interest of the State to keep down these payments as much as possible. We think that the State in this instance occupies exactly the position of the residuary legatees in the decision referred to, and that the interest of the State is represented by the Commissioners just as the interest of the residuary legatees was held to be represented by the executors. We do not however, admit that there appears anywhere in the Act of 1907 anything which would justify the assumption that the State of South Carolina desires to have the payment of the just liabilities as small as possible. On the contrary it is clear from the Act that the State desires that all of the just liabilities should be paid, and the only question with which the State is concerned is whether or not a liability is just. Certainly it cannot be contended that in the decision of this question

the court will not fully protect the interest of the State, or that the State will not have the opportunity to protect its own interest through the defendants. All the evidence which the State has tending to show that any of the claims made against the fund are not just may be furnished to the defendants and used by them in resisting the payment of the claim. It is perfectly clear, therefore, that the interests of the State will be fully protected, and that as between the parties litigant the court can render a final decree which will not injuriously affect the State, but which on the other hand will do full equity between the State and the creditors for the payment of whose debts the State has provided a fund. As was said by the learned Judge who delivered the opinion of the Circuit Court of Appeals, "It is the peculiar province of courts of equity to administer trusts. Indeed it is a familiar saying that 'equity loves a trust', and that it will not permit a trust to fail for the want of a trustee. In a court of equity, which is a forum of conscience, the shortcomings of the law can be supplied, and every interest and right can be protected and administered, so as to insure exact justice. The proceedings in these courts are of such a character as to be most conducive to the ascertainment of truth, and besides this, a chancellor may, if he deems it expedient, be aided in determining a difficult issue of fact by calling to his assistance a jury on the law side of the docket."

Murray *vs.* Wilson Distilling Co., 164 Fed. 1 (22)

See also,

Payne *vs.* Hook, 7 Wallace 425.
Hotel Co. *vs.* Wade, 97 U. S. 13.

There has been much discussion in this case of the very interesting question as to how far the Eleventh Amendment protects a State against a suit to enforce the payment of a debt contracted outside of its sovereignty. A decision of this question is not essential because the suits of complainants are fully sustained by the ordinary principles of equity applicable to the administration of trusts. But if we must construe the Constitution in the light in which it presented itself to the framers, it may well be

doubted if the Eleventh Amendment affords any protection against such a debt. The purpose of the Amendment was to protect the State in the exercise of those functions which pertain to its sovereignty, and while a State may have the power to engage in business in competition with its citizens, it is inconceivable that the framers of the Eleventh Amendment ever contemplated that a State might engage in business, contract debts in the purchase of property used to carry on the business, sell the property, so purchased, at a large profit, put the money realized from the sales into its Treasury, and when called upon to pay plead the Eleventh Amendment, and say to the creditors, whose property it has taken, you cannot enforce your just claims by suit, and therefore you must accept such part of your debt as the State is inclined to pay or get nothing. This would, indeed, change the amendment from a shield to a sword. That it it was not so intended, and that the State is amenable to the law whenever it engages in business outside of its sovereignty, is clearly established by this Court in a decision to which this very State was a party, and in which this very business and institution were involved.

South Carolina *vs.* United States, 199 U. S. 437.

Upon the foregoing authorities, this Court has settled all of the questions propounded in the outset against the contention of the petitioners. The decision of the Circuit Court of Appeals, presided over by the learned Chief Justice of this Court, affirming the decision of the Circuit Court for the District of South Carolina, and holding that the defendants are Trustees, and the fund in their hands a trust fund, that this is not a suit against the State of South Carolina, and that the State of South Carolina is not an indispensable party, was correct and should be affirmed.

Respectfully submitted,

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